(1) FILED U.S.

03-1424 APR - 9 2004

In The
Supreme Court of the United States

ALI SALEH KAHLAH al-MARRI,

Petitioner,

v.

DONALD RUMSFELD, Secretary of Defense, and M.A. MARR, Commander, Naval Consolidated Brig, Charleston, South Carolina,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE S. LUSTBERG, ESQ.
Counsel of Record

MARK A. BERMAN, ESQ.
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

Attorneys for Petitioner Ali Saleh Kahlah al-Marri

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit erred in holding – contrary to *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted sub nom. Rumsfeld v. Padilla*, No. 03-1027, 2004 WL 95802 (Feb. 20, 2004), and *Gherebi v. Bush*, 352 F.3d 1278, 1300-02 (9th Cir. 2003) – that the only respondent to a habeas petition filed by one detained as a so-called "enemy combatant" is the petitioner's immediate custodian, and that the only district in which such a petition may be heard is the one in which the petitioner and his immediate custodian are located, contrary to *Braden v. 30th Jud. Cir. Ct.*, 410 U.S. 484 (1973).

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Ali Saleh Kahlah al-Marri
2. George W. Bush, President of the United States
3. Donald H. Rumsfeld, Secretary of Defense
4. Melanie A. Marr, Commander, Naval Consolidated Brig, Charleston, South Carolina

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
CITATIONS OF OPINIONS AND ORDERS	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	9
A. The Court of Appeals Erred In Concluding That The Only Proper Respondent To A Habeas Petition Is The Petitioner's Immediate Custodian	9
B. The Court of Appeals Erred In Concluding That The Only Forum For A Habeas Petition Is The District In Which The Petitioner Is Detained	18
C. The Court of Appeals Erred In Concluding That The President May Not Ever Be Named As A Respondent To A Habeas Petition	24
D. The Court Should Grant The Petition For A Writ Of Certiorari In This Case Rather Than Hold The Petition Pending Its Disposition In *Padilla*	28
CONCLUSION	29

TABLE OF CONTENTS – Continued

Page

APPENDIX

Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004) ..... *App.* 1

Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) ..... *App.* 12

Dist. Ct. Order Denying Reconsideration (8/25/03) ..... *App.* 27

Petition for Writ of Habeas Corpus (without exhibits) ..... *App.* 33

President Bush's "Enemy Combatant" Order (6/23/03) ..... *App.* 55

President Bush's Military Order (11/13/01)..... *App.* 57

TABLE OF AUTHORITIES

Page

CASES

Ahrens v. Clark, 335 U.S. 188 (1948) 18

Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) 1, 7

Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004) 1

Armentero v. INS, 340 F.3d 1058 (9th Cir. 2003) 10, 11, 17, 19

Bennett v. Soto, 850 F.2d 161 (3d Cir. 1988) 11

Braden v. 30th Jud. Cir. Ct., 410 U.S. 484 (1973) .... *passim*

Burns v. Wilson, 346 U.S. 127 (1953) 12

Carney v. Secretary of Defense, 462 F.2d 606 (1st Cir. 1972) 11

Cheney v. United States Dist. Ct., 124 S. Ct. 1391 (2004) 26

Clinton v. Jones, 520 U.S. 681 (1997) 25

Cohen v. United States, 297 F.2d 760 (9th Cir. 1962) 21

Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne, 250 U.S. 163 (1919) 27

Dalton v. Specter, 511 U.S. 462 (1994) 26, 27

Demjanjuk v. Meese, 784 F.2d 1114 (D.C. Cir. 1986) 11

Denlinger v. Brennan, 87 F.3d 214 (7th Cir. 1996) 21

Dunn v. United States Parole Comm'n, 818 F.2d 742 (10th Cir. 1987) 11

Eisel v. Secretary of the Army, 477 F.2d 1251 (D.C. Cir. 1973) 10

Ellingburg v. Connett, 457 F.2d 240 (5th Cir. 1972) 21

TABLE OF AUTHORITIES – Continued

Page

Ex Parte Endo, 323 U.S. 283 (1944)..... *passim*

Ex parte Merryman, 17 F. Cas. 144 (1861) 14

Franklin v. Massachusetts, 505 U.S. 788 (1992)... 24, 25, 26

Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) 8, 17

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998)..... 16, 17, 19

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 20

Lantz v. Seamans, 504 F.2d 423 (2d Cir. 1974)..... 11

Marbury v. Madison, 1 Cranch 137 (1803) 25

McCoy v. United States Bd. of Parole, 537 F.2d 962 (8th Cir. 1976)..... 11

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 20

Middendorf v. Henry, 425 U.S. 25 (1976) 12

Mississippi v. Johnson, 71 U.S. 475 (1866)..... 26, 27

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 25, 26

Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2003) 27

Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *cert. granted sub nom. Rumsfeld v. Padilla*, No. 03-1027, 2004 WL 95802 (Feb. 20, 2004)..... *passim*

Parisi v. Davidson, 396 U.S. 1233 (1969) 12

Reimnitz v. State's Att'y of Cook County, 761 F.2d 405 (7th Cir. 1985)..... 10

Robledo-Gonzalez v. Ashcroft, 342 F.3d 667 (7th Cir. 2003) 17

TABLE OF AUTHORITIES – Continued

Page

Samirah v. O'Connell, 335 F.3d 545 (7th Cir. 2003) 11

Schlesinger v. Councilman, 420 U.S. 738 (1975) 12

Secretary of the Navy v. Avrech, 418 U.S. 676 (1974) 12

Stifel v. Hopkins, 477 F.2d 1116 (6th Cir. 1973) 21

Strait v. Laird, 406 U.S. 341 (1972) 9, 12, 13, 19

Sullivan v. Freeman, 944 F.2d 334 (7th Cir. 1991) 21

United States ex rel. Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954) 11

United States v. Burr, 25 F. Cas. 30 (C.C. Va. 1807) 25

United States v. Nixon, 418 U.S. 683 (1974) 25

Vazquez v. Reno, 233 F.3d 688 (1st Cir. 2000) 17

Wales v. Whitney, 114 U.S. 564 (1885) 9, 14

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 25

STATUTES & RULES

10 U.S.C. § 892 14

10 U.S.C. § 896 14

18 U.S.C. § 1001 3

18 U.S.C. § 1014 3

18 U.S.C. § 1028 3

18 U.S.C. § 1029 3

28 U.S.C. § 1254 1

28 U.S.C. § 2241 ..... 1, 8, 12, 18, 19

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2242 ..... 2, 8

28 U.S.C. § 2243 ..... 2, 8

OTHER AUTHORITIES

Philip Shenon, *U.S. Will Defy Court's Order In Terror Case*, N.Y. Times, July 15, 2003 14

PETITION FOR WRIT OF CERTIORARI

Ali Saleh Kahlah al-Marri respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 8, 2004.

CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Seventh Circuit (*App.* 1) is reported at *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004). The district court's initial opinion (*App.* 12) is reported at *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003). The district court's opinion on Petitioner's motion for reconsideration (*App.* 27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241 provides in relevant part as follows:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

28 U.S.C. § 2242 provides in relevant part as follows:

> Application for a writ of habeas corpus shall be in writing and signed and verified by the person for whose relief it is intended or by someone acting in his behalf.
>
> It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known. . . .

28 U.S.C. § 2243 provides in relevant part as follows:

> . . . . The writ, or order to show cause shall be directed to the person having custody of the person detained. . . .

STATEMENT OF THE CASE

1. On September 10, 2001, Petitioner lawfully entered the United States, with his wife and five children, for the purpose of obtaining a master's degree from Bradley University in Peoria, Illinois, the same institution from which he had earned a bachelor's degree in 1991. *App.* 35 (Habeas Pet. ¶ 7).

2. On December 12, 2002, Petitioner was detained in Peoria by the Federal Bureau of Investigation ("FBI") as a material witness in the government's investigation of the terrorist attacks of September 11, 2001. Thereafter, Petitioner was transported by the FBI from the Peoria County Jail to the Metropolitan Correctional Center in New York City ("MCC-NY"). *App.* 35 (Habeas Pet. ¶ 8).

3. On January 28, 2002, the government formally arrested Petitioner on a criminal complaint, charging him

with credit card fraud related to his alleged involvement with al-Qaeda. *App.* 35 (Habeas Pet. ¶ 10).

4. On February 6, 2002, the government charged Petitioner in a one-count indictment with possession of fifteen or more unauthorized or counterfeit access devices, with intent to defraud, in violation of 18 U.S.C. § 1029(a)(3). The case was assigned to the Honorable Victor Marrero, United States District Judge for the Southern District of New York. *App.* 36 (Habeas Pet. ¶ 11).

5. On February 8, 2002, Petitioner entered a plea of "not guilty" to the indictment and thereby asserted his innocence. *App.* 36 (Habeas Pet. ¶ 12).

6. The criminal case was litigated in the normal course, during which time the government repeatedly endeavored to elicit Petitioner's cooperation, promising an improvement in the conditions of his confinement in return for his assistance. *App.* 36 (Habeas Pet. ¶ 13).

7. On January 22, 2003, when Petitioner continued to assert his innocence, he was charged in a second, six-count indictment with two counts of making a false statement to the FBI, in violation of 18 U.S.C. § 1001, three counts of making a false statement in a bank application, in violation of 18 U.S.C. § 1014, and one count of using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. § 1028(a)(7), all related to his alleged involvement with al-Qaeda. This second indictment was assigned to the Honorable Denise L. Cote, United States District Judge for the Southern District of New York. *App.* 36 (Habeas Pet. ¶ 14).

8. On January 24, 2003, Petitioner entered a plea of "not guilty" to the second indictment and thereby asserted his innocence. *App.* 36 (Habeas Pet. ¶ 15).

9. On March 28, 2003, Petitioner moved to consolidate the two Southern District of New York indictments. *App.* 37 (Habeas Pet. ¶ 18).

10. On April 23, 2003, Petitioner moved to dismiss the indictments on the ground that all of the conduct charged was alleged to have taken place in the Central District of Illinois, and that venue was therefore improper in the Southern District of New York. *App.* 37 (Habeas Pet. ¶ 19).

11. On April 24, 2003, Judge Marrero granted Petitioner's motion to consolidate the cases. *App.* 37 (Habeas Pet. ¶ 20).

12. On May 7, 2003, at the request of the government, Petitioner and counsel met with David N. Kelley, Deputy U.S. Attorney for the Southern District of New York. Mr. Kelley informed Petitioner that, if he insisted on dismissing the Southern District of New York indictments, and continued in his assertion of innocence, the circumstances of his confinement, which were already severe, would be further aggravated. *App.* 37 (Habeas Pet. ¶ 21).

13. Petitioner remained resolute in his claim of innocence. *App.* 37 (Habeas Pet. ¶ 22).

14. On May 12, 2003, Judge Marrero granted Petitioner's motion and dismissed the indictments because venue was constitutionally improper in the Southern District of New York. *App.* 38 (Habeas Pet. ¶ 23).

15. On May 13, 2003, Petitioner was arraigned in the Southern District of New York on a newly unsealed criminal complaint that had been returned in the Central District of Illinois on May 1, 2003. *App.* 38 (Habeas Pet. ¶ 24).

16. On or about May 20, 2003, Petitioner was returned from MCC-NY to the Peoria County Jail. *App.* 38 (Habeas Pet. ¶ 25).

17. On May 22, 2003, a grand jury sitting in the Central District of Illinois returned an indictment against Petitioner alleging the same seven counts as had been charged in the dismissed Southern District of New York indictments, and all arising from his alleged involvement with al-Qaeda. *App.* 38 (Habeas Pet. ¶ 27).

18. On May 29, 2003, Petitioner was arraigned before the Honorable John A. Gorman, United States Magistrate Judge for the Central District of Illinois. Petitioner entered a plea of "not guilty" to the indictment and thereby asserted his innocence to the charges. *App.* 38 (Habeas Pet. ¶ 28).

19. Judge Gorman set a pretrial conference date of July 2, 2003, and a trial date of July 21, 2003, before the Honorable Michael M. Mihm, United States District Judge for the Central District of Illinois. *App.* 38 (Habeas Pet. ¶ 29).

20. On June 18, 2003, defense counsel filed pretrial motions on Petitioner's behalf seeking an Order, among other things, suppressing evidence seized and statements allegedly obtained from Petitioner, in violation of his rights under the Fourth and Fifth Amendments to the United States Constitution. *App.* 40-41 (Habeas Pet. ¶ 34).

21. On the afternoon of Friday, June 20, 2003, Judge Mihm directed the parties to be prepared to proceed on July 2, 2003, with an evidentiary hearing on Petitioner's pretrial motions, and to confer regarding the witnesses who would testify at such a hearing. *App.* 41 (Habeas Pet. ¶ 35).

22. At approximately 9:05 a.m., on the morning of Monday, June 23, 2003, defense counsel became aware that United States Attorney Jan Paul Miller was en route to Judge Mihm's chambers. There, Mr. Miller moved *ex parte* to dismiss the indictment without prejudice, *App.* 41 (Habeas Pet. ¶ 37), based upon a signed order of the President of the United States which: 1) designated Petitioner an "enemy combatant"; 2) directed the Attorney General to surrender Petitioner to the Secretary of Defense; and 3) directed the Secretary of Defense to detain Petitioner as an "enemy combatant." *App.* 55 (Enemy Combatant Order).

23. When defense counsel requested an opportunity to file a brief in response to the government's application, the United States Attorney orally amended the government's motion to dismiss the indictment *with* prejudice. The district court then concluded that it was without discretion to deny the government's request, and entered an Order dismissing the indictment against Petitioner with prejudice. *App.* 42 (Habeas Pet. ¶ 44).

24. Defense counsel orally moved the district court to stay the transfer of Petitioner for one day so counsel could file a habeas petition in Mr. al-Marri's behalf. *See* 6/23/03 Hearing Tr. at 13. The court denied counsel's motion. *App.* 42 (Habeas Pet. ¶ 39).

25. Petitioner was immediately taken from the custody of the United States Marshals Service at the Peoria County Jail, into the custody of Secretary Rumsfeld, and removed to the Naval Consolidated Brig in Charleston, South Carolina, where he is being held incommunicado. *App.* 42 (Habeas Pet. ¶ 40).

26. On July 8, 2003, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois, challenging his designation by the President and detention by Respondents as an "enemy combatant." *App.* 33 (Habeas Petition).

27. On July 16, 2003, Respondents moved the district court to dismiss Petitioner's habeas petition for lack of jurisdiction over the petitioner's immediate custodian or, in the alternative, to transfer the petition to the District of South Carolina because that is where Petitioner was being detained.

28. On August 1, 2003, the district court dismissed al-Marri's habeas petition on the ground that venue was proper only in the District of South Carolina, where Petitioner and his immediate custodian were located. *App.* 12 (*Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003)). *See also App.* 27 (Order & Opinion denying Petitioner's motion for reconsideration).

29. On October 2, 2003, Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit from the final order entered by the district court.

30. On March 8, 2004, the Seventh Circuit affirmed the order of the district court. *App.* 1. Specifically, the court of appeals held that the only court with authority to

entertain al-Marri's habeas petition was the one sitting in the district in which Petitioner and his immediate custodian were located. In so holding, the court of appeals expressly rejected the Second Circuit's decision in *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted sub nom. Rumsfeld v. Padilla*, No. 03-1027, 2004 WL 95802 (Feb. 20, 2004). *See also Gherebi v. Bush*, 352 F.3d 1278, 1300-02 (9th Cir. 2003) (holding that Secretary Rumsfeld was proper respondent to habeas petition filed by enemy combatant).

31. The court of appeals also removed President Bush's name from the caption of this case because, the court held, the President may never be named as a respondent to a habeas petition. *App.* 2-3.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit has held that the only possible respondent to a habeas petition filed by an "enemy combatant" is his immediate custodian, and that because district judges may issue writs of habeas corpus only "within their respective jurisdictions," 28 U.S.C. § 2241(a), the only forum in which a habeas petition may be entertained is the district in which the petitioner and his immediate custodian are located. In so holding, the court of appeals expressly rejected the Second Circuit's decision in *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted sub nom. Rumsfeld v. Padilla*, No. 03-1027, 2004 WL 95802 (Feb. 20, 2004), and the Ninth Circuit's decision in *Gherebi v. Bush*, 352 F.3d 1278, 1300-02 (9th Cir. 2003), each of which held that Secretary Rumsfeld was properly named as a respondent to a habeas petition filed by a

petitioner challenging his designation as an "enemy combatant," based upon this Court's decisions in *Ex Parte Endo*, 323 U.S. 283 (1944), *Strait v. Laird*, 406 U.S. 341 (1972), and *Braden v. 30th Jud. Cir. Ct.*, 410 U.S. 484 (1973). In those cases, the Court adopted a more flexible concept of "custodian" than the "immediate" custodian rule pronounced by the Seventh Circuit, and recognized that district courts act "within their respective jurisdictions" so long as their process can reach the petitioner's custodian, regardless of where the petitioner is confined or his custodian located. Because the decision issued by the Seventh Circuit has created a circuit split, and cannot be reconciled with this Court's own precedents, a writ of certiorari should issue to review the Seventh Circuit's decision.

A. The Court of Appeals Erred In Concluding That The Only Proper Respondent To A Habeas Petition Is The Petitioner's Immediate Custodian.

The Seventh Circuit held that Commander Melanie A. Marr, Petitioner's "immediate" custodian, is the only proper respondent to Petitioner's habeas petition, relying upon *Wales v. Whitney*, 114 U.S. 564, 574 (1885). The habeas statute, however, does not specify who the person having custody will be, *see* 28 U.S.C. §§ 2242, 2243, and the precedent upon which the court of appeals relied does not limit the concept of "custodian" to a petitioner's immediate custodian.

1. In *Wales v. Whitney*, *supra*, this Court observed that the habeas statute:

> contemplates a proceeding against some person who has the immediate custody of the party

> detained, *with power to produce the body of such party before the court or judge*, that he may be liberated if no sufficient reason is shown to the contrary.

114 U.S. at 574 (emphasis added). Far from holding that a habeas petitioner's "immediate" custodian is *always* the proper custodian for habeas purposes, the Court recognized in *Wales* that immediate custody of the petitioner is not sufficient; rather, the custodian must have the power to produce the body of the petitioner in response to a judicial order. Indeed, as the Seventh Circuit itself had previously held in a case left uncited by the court of appeals here:

> The important thing is not the quest for a mythical custodian, but that the petitioner name as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit – namely, his unconditional freedom.

Reimnitz v. State's Att'y of Cook County, 761 F.2d 405, 409 (7th Cir. 1985). This broad conception of "custodian" is consistent with *Braden*, 410 U.S. at 494-95, which cited *Wales* even as it concluded that the entity named as Braden's custodian under the circumstances of that case was not his jailer but, rather, the local court. *See also Armentero v. INS*, 340 F.3d 1058, 1064 (9th Cir. 2003) ("Read as a whole, the Supreme Court's pertinent case law indicates that the concept of custodian is a broad one that includes any person empowered to end restraint of a habeas petitioner's liberty, not just the petitioner's on-site, immediate, physical custodian."); *Eisel v. Secretary of the*

Army, 477 F.2d 1251, 1254 (D.C. Cir. 1973) (rejecting concept of "immediate custodian").

2. Although in the usual habeas case the local warden has authority to produce the body in response to a court order, even the Seventh Circuit has recognized that this is not always so, *see Samirah v. O'Connell*, 335 F.3d 545, 551-52 (7th Cir. 2003) ("The custodian, in *most* cases, is the person having a day-to-day control over the petitioner, *because he is the only one who can produce 'the body' of the petitioner.*") (emphasis added). Indeed, there is no formulaic answer as to who qualifies as a "custodian" in such atypical cases.

3. Thus, this Court and the courts of appeals have frequently held that members of the Executive branch of government, who exhibited far less immediate control over a petitioner than that exerted by the President and the Secretary of Defense in this case, were properly named as respondents to habeas petitions. *See, e.g.*, *Ex Parte Endo*, 323 U.S. at 304-07 (Acting Secretary of the Interior); *Armentero v. INS*, 340 F.3d 1058, 1064 (9th Cir. 2003) (Attorney General); *Bennett v. Soto*, 850 F.2d 161, 163 (3d Cir. 1988) (parole board chairperson); *Dunn v. United States Parole Comm'n*, 818 F.2d 742, 744 (10th Cir. 1987) (U.S. Parole Commission); *Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Attorney General); *McCoy v. United States Bd. of Parole*, 537 F.2d 962, 964-65 (8th Cir. 1976) (parole board); *Lantz v. Seamans*, 504 F.2d 423, 424 (2d Cir. 1974) (Secretary of the Air Force); *Carney v. Secretary of Defense*, 462 F.2d 606, 607 (1st Cir. 1972) (Secretary of Defense and Secretary of the Navy); *United States ex rel. Circella v. Sahli*, 216 F.2d 33, 37 (7th Cir. 1954) (INS district director). Moreover, it has long been an accepted jurisdictional practice to denominate the Secretary of

Defense or applicable Service Secretary as a respondent in cases, like this one, where the petitioner is in military custody. *See Middendorf v. Henry*, 425 U.S. 25 (1976) (Secretary of the Navy); *Schlesinger v. Councilman*, 420 U.S. 738 (1975) (Secretary of Defense); *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974); *Strait v. Laird*, 406 U.S. 341 (1972) (Secretary of Defense); *Parisi v. Davidson*, 396 U.S. 1233 (1969) (Secretary of the Army); *Burns v. Wilson*, 346 U.S. 127 (1953) (Secretary of Defense).

4. The typical habeas petition filed under 28 U.S.C. § 2241 involves a petitioner who has been tried and convicted, and who seeks to challenge not the *imposition* but, rather, the *execution* of his sentence. In such cases, the petitioner's "immediate" custodian: (1) is the only official who continues to play a direct role in the petitioner's detention, *and* (2) has the authority to produce the petitioner in response to a court order. Neither of these conditions applies to the unique circumstances of the two individuals (Padilla and al-Marri) who have been designated "enemy combatants" by the President, seized within the United States, and transferred to the custody of the Secretary of Defense. As the Second Circuit explained in *Padilla*:

> [T]his is not the usual situation. What makes the usual case usual is that the petitioner is serving a sentence, and the list of those other than the warden who are responsible for his confinement includes only people who have played particular and discrete roles in confining him, notably the prosecuting attorney and the sentencing judge, and who no longer have a substantial and ongoing role in his continued confinement. Thus, the warden becomes the respondent of choice almost by default.

> When habeas petitions are brought by persons detained for reasons other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent.

352 F.3d at 704-08 & nn.9-15 (internal quotation marks omitted).

5. The Seventh Circuit held that because Petitioner al-Marri is in actual physical custody, this case is distinguishable from those cases in which the "immediate" custodian rule has been relaxed. *App.* 8-9. However, this distinction between physical and inchoate custody is one that this Court has not previously endorsed. Indeed, the petitioners in *Braden v. 30th Jud. Cir. Ct.*, 410 U.S. 484 (1973), and *Ex Parte Endo*, 323 U.S. 283, 305 (1944), were each physically incarcerated outside of the jurisdiction in which their petitions were filed; nevertheless, this Court recognized in those cases that one other than the petitioner's immediate custodian could produce the body and, hence, serve as a proper respondent. Similarly, in *Strait v. Laird*, 406 U.S. 341 (1972), which involved a habeas petition filed by a military reserve officer present in California, this Court did not question that the petitioner's custodian was his commanding officer at Fort Benjamin Harris, Indiana but, rather, focused on the dispositive issue, i.e., whether that custodian could be reached by process in California. *Id.* at 345-46 ("The concepts of 'custody' and 'custodian' are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction.").

6. Although Commander Marr is Petitioner's immediate custodian, she is an active duty military officer who cannot disobey the orders of her military superiors, including the orders of her Commander-in-Chief and the Secretary of Defense pursuant to which Petitioner is detained. If she were to release Petitioner without their approval, she would be subject to prosecution by court-martial for violating her superiors' confinement order, 10 U.S.C. § 892, and for illegally releasing a prisoner, 10 U.S.C. § 896. Moreover, the notion that Commander Marr would unilaterally comply with the order of a civilian judge over one issued by the President of the United States is belied by historical precedent, *see Ex parte Merryman*, 17 F. Cas. 144 (1861), and by the actions of other members of the current Administration, *see* Philip Shenon, *U.S. Will Defy Court's Order In Terror Case*, N.Y. Times, July 15, 2003, at A1 (reporting that Attorney General Ashcroft would refuse to comply with court order to produce enemy combatant even in face of court sanction). Thus, in contrast to the usual habeas case, Petitioner's immediate custodian – Commander Marr – is not one "with power to produce the body of [the petitioner] before the court." *Wales*, 114 U.S. at 574. Rather, President Bush and Secretary Rumsfeld control when Petitioner will be released, if ever, and it is they alone who have the power to "produce the body."

7. President Bush has played, and continues to play, a direct, substantial, and ongoing role in Petitioner's continued confinement. Petitioner was seized in, and removed from, the Central District of Illinois, and is currently being detained based solely upon the June 23, 2003 order, issued by the President himself, designating Petitioner an "enemy combatant." *App.* 55 (Enemy Combatant Order). Under section 2(a)(1) of the underlying

Military Order of November 13, 2001 (*App.* 57), which was also issued by the President himself, only the President can designate an individual an "enemy combatant," and only he can remove that designation. Under section 2(c) of that Order, only the President can, as he did in this case, order the removal of an individual from our civil system of justice to a military prison. And, under section 7(e), only the President can direct the Secretary of Defense to transfer Petitioner from the custody of the Department of Defense to another governmental authority, or to release him. Thus, in contrast to the usual case described by the court of appeals, in which "[t]he legislature . . . , the criminal investigator . . . , the prosecutor, the grand jurors . . . , the petit jurors . . . , the judge . . . , the state or federal attorney general, the governor (or President)" no longer play a direct, substantial, and ongoing role in a habeas petitioner's detention, *App.* 3, here it is the President who ordered Petitioner's incarceration in the first instance, and it is he alone who will decide when and whether Petitioner is ever released. For these reasons, President Bush is Petitioner's primary custodian, and properly was named as a respondent in this case.

8. Like the President, Secretary Rumsfeld maintains a direct, substantial, and ongoing role in Petitioner's continued confinement. On June 23, 2003, Secretary Rumsfeld was ordered by the President "to receive Mr. al-Marri from the Department of Justice and to detain him as an enemy combatant," *App.* 55 (Enemy Combatant Order), and he has done so. Under sections 2(b) & 3(a) of the President's November 13 Military Order, Secretary Rumsfeld "shall take all necessary measures" to ensure that Petitioner is detained in accordance with the President's Order, and it is he alone who designates the site of

Petitioner's detention. Under section 5, Secretary Rumsfeld has presidential authorization to demand the assistance of every department and member of the United States government in carrying out his duties under the President's Order. For these reasons, the Second Circuit concluded in *Padilla* that Secretary Rumsfeld's role in the continued detention of the petitioner was historically unprecedented:

> Secretary Rumsfeld was charged by the President . . . with detaining Padilla. In following that Order, the Secretary sent DOD personnel into the Southern District of New York to take custody of Padilla. Secretary Rumsfeld, or his designees, determined that Padilla would be sent to the brig in South Carolina. Although Commander Marr is the commander of the Brig, the legal reality of control is vested with Secretary Rumsfeld, since only he – not Commander Marr – could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary. In this respect, "the extraordinary and pervasive role that [Secretary Rumsfeld] played in [this] matter[] is virtually unique." *Henderson v. INS*, 157 F.3d 106, 126 (2d Cir. 1998). In fact, this degree of Cabinet-level involvement is unprecedented as far as we have been able to determine. Accordingly, we do not undertake to articulate a rule defining the proper respondent in a habeas case other than one involving a petitioner designated as an enemy combatant under circumstances congruent with Padilla's designation and detention. We only hold that, here, Secretary Rumsfeld is the proper respondent.

352 F.3d at 707-08. *Accord Gherebi v. Bush*, 352 F.3d 1278, 1300 n.28 (9th Cir. 2003) (holding that Secretary Rumsfeld is the appropriate respondent to habeas petition filed by "enemy combatant"). The role that Secretary Rumsfeld played in connection with the detention of Petitioner al-Marri is indistinguishable from the case of Padilla, and is fundamentally different from the role that national-level Cabinet officials play in other habeas cases. Accordingly, Secretary Rumsfeld is Petitioner's custodian and properly was named as a respondent in this case.[1]

Here, the President and the Secretary of Defense have retained control over Petitioner's fate not simply as a bureaucratic matter but, rather, by virtue of their personal involvement in his initial and continued detention; it is they alone who will decide when Petitioner will be released, and whether the military will abide by any writ issued by a federal court. Thus, unlike the usual habeas case, President Bush and Secretary Rumsfeld have a direct, substantial, and ongoing role in Petitioner's confinement; Commander Marr has a nominal one. Hence,

---

[1] There is a growing circuit split on the question of whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending removal. *Compare Armentero v. INS*, 340 F.3d 1058, 1070 (9th Cir. 2003) *and Henderson v. INS*, 157 F.3d 106, 125-26 (2d Cir. 1998) *with Robledo-Gonzalez v. Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003) *and Vazquez v. Reno*, 233 F.3d 688, 691 (1st Cir. 2000).. Although immigration cases may be distinguishable from this case and *Padilla* on the grounds that the Attorney General is not personally involved in the typical alien detention matter, whereas both President Bush and Secretary Rumsfeld were personally and directly involved in the detentions of Padilla and al-Marri as "enemy combatants," the existence of this circuit conflict provides a further reason for this Court to grant certiorari in this case.

each is Petitioner's custodian, and each properly was named as a respondent to al-Marri's habeas petition. The court of appeals' decision to the contrary should be reviewed by the Court.

B. The Court of Appeals Erred In Concluding That The Only Forum For A Habeas Petition Is The District In Which The Petitioner Is Detained.

The Seventh Circuit also held that the only forum in which Petitioner's habeas petition may be entertained is the district in which he and his immediate custodian are located, because district judges may issue writs of habeas corpus only "within their respective jurisdictions," 28 U.S.C. § 2241(a). *App.* 5. In so holding, the court of appeals erroneously resurrected the black-letter jurisdictional rule of *Ahrens v. Clark*, 335 U.S. 188 (1948) (holding that habeas petition may be filed only in the district in which the petitioner is confined), which this Court rejected in *Braden v. 30th Jud. Cir. Ct.*, *supra*, as a rule of venue. So that the Court's decision in *Braden* does not become a nullity, the court of appeals' decision should be reviewed on the merits.

1. In *Ex Parte Endo*, *supra*, this Court held that the government cannot defeat habeas jurisdiction by removing a petitioner from the district in which she has filed her habeas petition. In *Endo*, the Court expressly declined to consider "whether the presence of the person detained within the territorial jurisdiction of the District Court is a prerequisite to filing a petition for a writ of habeas corpus" in the first instance. 323 U.S. at 305. In *Ahrens v. Clark*, 335 U.S. 188 (1948), the Court held that it was. In *Braden*, however, the Court reversed course, holding that the phrase

"within their respective jurisdictions" did not require a petitioner or his custodian to be physically present in the district in which the habeas petition was filed for purposes of jurisdiction *or* venue. 410 U.S. at 499-500. With respect to jurisdiction, the Court held:

> § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction.

Braden, 410 U.S. at 495. With respect to venue, the Court held that "traditional venue considerations" are determinative, including most significantly where the material events took place. *Id.* at 493-94. Thus, in *Braden*, where the petitioner challenged the denial of his right to a speedy trial in Kentucky as a result of his incarceration in Alabama, venue was appropriate in Kentucky because that is where the material events took place, and despite the fact that the petitioner and his immediate custodian were in Alabama. *Id.*[2]

---

[2] The Seventh Circuit would limit the holding of *Braden* to interstate detainer cases. *Braden*, however, has never been interpreted so narrowly. *See Armentero v. INS*, 340 F.3d 1058, 1070 (9th Cir. 2003) (observing that *Braden* stands for the general proposition that a habeas suit does not have to be brought in the district where prisoner is detained); *Henderson v. INS*, 157 F.3d 106, 127 (2d Cir. 1998) (same). Moreover, the Seventh Circuit's determination that venue and jurisdiction are strictly limited to

(Continued on following page)

2. The Seventh Circuit correctly held that, in an official-capacity suit such as this, "every federal office has 'contacts' with the whole United States of America," such that the federal court in the Central District of Illinois could exercise jurisdiction over President Bush, Secretary Rumsfeld, or Commander Marr in their respective official capacities. *App.* 4-5. Indeed, the Court explicitly held in *Strait v. Laird* that a custodian who is outside the territorial confines of the district court may subject himself to the exercise of a district court's habeas jurisdiction by virtue of the actions of his agents within the district. 406 U.S. 341, 344-46 n.2 (1972) ("That such 'presence' may suffice for personal jurisdiction is well settled, and the concept is also not a novel one as regards habeas corpus jurisdiction.") (*citing McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Ex Parte Endo*, 323 U.S. 282 (1944)).

3. The court of appeals, however, ignored the venue portion of the *Braden* decision when it erroneously postulated that because Respondents "can be reached by service of process" in any district, the alternative to its holding that habeas litigation is limited to the district of confinement would be to hold that habeas litigation may be conducted in any of the 94 federal districts. *App.* 5-6.

---

the district in which petitioner and his immediate custodian are physically located is premised upon Congress' instruction in the habeas statute that courts may issue writs of habeas corpus only "within their respective jurisdictions." If that phrase means, as the court of appeals believed, that the petitioner must be present, then even the distinction drawn for "detainer" cases would be irreconcilable with the plain language of the habeas statute, and *Braden* would have been wrongly decided.

Braden explicitly held that, as a matter of *venue*, habeas litigation may be conducted only in a district which has a sufficient connection to the case such that "traditional venue considerations" militate in favor of that forum.

4. Although the court of appeals noted that it would be "irksome" if "al-Marri could choose the district courts located in Fairbanks, Minot, San Juan, or Agana," *App.* 6, Petitioner never proposed adoption of the "national venue" rule attacked by the court of appeals in its opinion. Nor did he file his habeas petition in a forum with no connection to the underlying events. Rather, Petitioner filed his petition in the Central District of Illinois because:

* that is where he resided with his family prior to his arrest;[3]

* that was the constitutionally required venue for the dismissed criminal charges, which arose from Petitioner's alleged involvement with al-Qaeda, because that is where all of the material events took place;[4]

---

[3] The court of appeals stated in its opinion that Petitioner "does not reside" in the Central District of Illinois. *App.* 4. Yet, Petitioner resided in Peoria, with his family, prior to his arrest, and it is well-established that his compelled removal by the government does not change his place of residence. *See Denlinger v. Brennan*, 87 F.3d 214, 216 (7th Cir. 1996) (holding that "forcible change in person's state of residence" by virtue of incarceration does not alter his domicile); *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991) (same); *Stifel v. Hopkins*, 477 F.2d 1116, 1121 (6th Cir. 1973) (same); *Ellingburg v. Connett*, 457 F.2d 240, 241 (5th Cir. 1972) (same) (*quoting Cohen v. United States*, 297 F.2d 760, 774 (9th Cir. 1962)).

[4] The court of appeals erroneously stated in its opinion that "[s]ome of al-Marri's activities took place in Illinois before his arrest and others during his time in the Southern District of New York as a material

(Continued on following page)

* that is where he was detained and taken into custody by Secretary Rumsfeld, on order of the President;

* that is where his status was transformed from a civilian entitled to all of the rights and privileges set forth in the United States Constitution, to an "enemy combatant" who, according to Respondents, has no rights at all.

These are the material events that gave rise to Petitioner's claim; all were completed or initiated by Respondents or their agents in the Central District of Illinois. Hence, under *Braden*, that district was an appropriate forum for this action. The mere fact that Respondents chose to remove petitioner from the district in which his claim accrued, in order to incarcerate him elsewhere, is not sufficient to mandate another venue.

5. The Seventh Circuit's conclusion that venue is dictated by the place of confinement would effectively overrule *Ex Parte Endo* and *Braden*. Specifically, if a petitioner's presence is not required for a district court to exercise habeas jurisdiction in the first instance, as the Supreme Court held in *Braden*, then his presence could not possibly be the sole determinative factor with respect to the secondary question of venue; otherwise, venue would

---

witness." *App.* 1. Petitioner did not do anything in the Southern District of New York other than be imprisoned in the high-security unit of the MCC, which is why the Southern District of New York indictments were dismissed on venue grounds, and the government was compelled to re-indict him in the Central District of Illinois, which is where all of the actions allegedly linking Petitioner to al-Qaeda took place.

always subsume the threshold jurisdictional analysis, contrary to the result in *Braden*, 410 U.S. at 495 (holding that habeas petition filed by petitioner incarcerated in Alabama could be adjudicated in Kentucky). Moreover, were a petitioner's presence required for venue to be proper, as the Seventh Circuit has held, then the government could – as it did here – simply remove the petitioner from a district in which it preferred not to litigate, thereby defeating venue and effecting an end-run around *Ex Parte Endo*, 323 U.S. at 307.

6. The court of appeals noted that "requiring prisoners to litigate where they are confined . . . not only distributes business among the district courts and circuits but also allows important issues to percolate through multiple circuits before the Supreme Court must review a disputed question," *App.* 6. Whereas there are millions of prisoners incarcerated throughout the country, there are only three "enemy combatants" being detained within the United States, all of whom are being detained in a single Navy brig in Charleston, South Carolina. For that very reason, Respondents have argued to this Court that not only al-Marri but Padilla as well should have been required to file his habeas petition in a single federal district, i.e., the District of South Carolina. Moreover, because Navy brigs are not located in every state, even if the number of individuals detained as "enemy combatants" should increase in the future, such atypical petitioners will never be as numerous as, or spread across the country like, state and federal prisoners detained within the civil prison system. Therefore, limiting venue in "enemy combatant" cases to the district of confinement would in fact defeat the salutary goal, desired by the Seventh Circuit, of "allow[ing] important issues to percolate through multiple

circuits before the Supreme Court must review a disputed question."

Petitioner's habeas claim arose in, and is substantially linked to, the Central District of Illinois. Therefore, under *Braden*, that was the proper forum in which Petitioner's claim should have been heard. The court of appeals' contrary conclusion, that venue in habeas cases is limited to the district in which a habeas petitioner is confined, plainly merits the Court's review.

C. The Court of Appeals Erred In Concluding That The President May Not Ever Be Named As A Respondent To A Habeas Petition.

The Seventh Circuit also erred in holding that naming President Bush as a respondent in this matter was "improper" because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates." *App.* 2-3 (*citing Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)). This Court, however, has never held that a district court may not exercise jurisdiction over the President in a case, like this one, in which Petitioner claims that the President has exceeded his constitutional authority, as opposed to some discretionary authority granted to him by Congress. *See Franklin*, 505 U.S. at 801 (holding that "President's actions may . . . be reviewed for constitutionality," but not "for abuse of discretion under the APA").

1. The assertion that a court of the United States lacks the authority to enjoin the President in the performance of his official duties or otherwise to compel the President to perform any official act is premised upon the doctrine of separation of powers, which restrains each of

the three branches of the federal government from encroaching on the other two. Yet, this Court has held it to be "settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982). *See also Clinton v. Jones*, 520 U.S. 681, 703-04 (1997) (holding that the President "is subject to judicial process in appropriate circumstances") (*citing United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807) and *United States v. Nixon*, 418 U.S. 683 (1974)).

> When judicial action is needed to serve broad public interests – as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, *cf. Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579 (1952)], or to vindicate the public interest in an ongoing criminal prosecution, *see United States v. Nixon, supra* – the exercise of jurisdiction has been held warranted.

Nixon v. Fitzgerald, 457 U.S. at 754. Although the Court in *Nixon v. Fitzgerald* ultimately held that the "dangers of the intrusion on the authority and functions of the Executive Branch" outweigh other interests in connection with a "private suit for damages based on a President's official acts," *id.*, in cases which do not involve private claims for damages, like this one, the Court has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Clinton v. Jones*, 520 U.S. at 703 (*citing Youngstown, supra*, and *Marbury v. Madison*, 1 Cranch 137 (1803)). *Accord Franklin*, 505 U.S. at 801 (holding that "President's actions may . . . be reviewed for constitutionality," but not "for abuse of discretion under the APA").

2. Here, Petitioner does not seek damages from President Bush in his personal capacity. Rather, he seeks his freedom through judicial review of the President's assertion of constitutional authority to seize an individual lawfully present in the United States, and to detain him as an "enemy combatant," without charge and without access to counsel. Thus, relief is sought from the President only in his official capacity. *See Cheney v. United States Dist. Ct.*, 541 U.S. ___, 124 S. Ct. 1391, 1395-96 (2004) (Scalia, J.) (finding that it is neither rare nor inappropriate for even the Vice-President to be named in an official-capacity action in which he is represented by the Solicitor General or U.S. Department of Justice). Under such circumstances, this Court may properly exercise jurisdiction over the President in his official capacity, for it "acts, not in derogation of the separation of powers, but to maintain their proper balance." *Nixon v. Fitzgerald*, 457 U.S. at 754.

3. *Franklin*, *supra*, involved a claim that the President and his agents had exceeded discretionary authority granted to the President alone by congressional enactment. *See Dalton v. Specter*, 511 U.S. 462, 474 (1994) ("How the President chooses to exercise the discretion Congress has granted him is not a matter for our review."). Similarly, *Mississippi v. Johnson*, 71 U.S. 475, 499 (1866), involved an action to enjoin the President from choosing generals to command the several military districts under the Reconstruction Acts duly enacted by Congress in the aftermath of the Civil War, and from otherwise executing those congressional acts. These cases thus stand for the proposition that where a claim "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial

power." *Dalton*, 511 U.S. at 474 (*quoting Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919)).

4. It does not follow, however, that the President may not be made a respondent to a habeas petition challenging the constitutionality of the executive power here asserted by the President, which has landed Petitioner in a Navy brig. If the President has exceeded his constitutional authority, the court will order Petitioner's release from prison; releasing an individual from prison is a "ministerial" act, with "respect to which nothing is left to discretion," *see Mississippi v. Johnson*, 71 U.S. at 498, and one well within the power of a federal court to order.

It is the President himself who has asserted that he has authority under the Constitution to detain Petitioner as an "enemy combatant," without charge, process, or access to counsel. Therefore, the President himself is properly named as a respondent in this case. Although this issue is one that the district court in *Padilla* opted to avoid because it held that Secretary Rumsfeld was a sufficient respondent, *Padilla v. Bush*, 233 F. Supp. 2d 564, 583 (S.D.N.Y. 2003) ("There is no need to decide whether, were the facts otherwise, the President too could be named a respondent in a habeas corpus case such as this."), the Seventh Circuit chose to address it head on. Given the significance of the issue presented, it also merits further review by this Court.

D. The Court Should Grant The Petition For A Writ Of Certiorari In This Case Rather Than Hold The Petition Pending Its Disposition In *Padilla*.

Although both this case and *Rumsfeld v. Padilla*, No. 03-1027 (cert. granted Feb. 20, 2004), concern the question of whether the only proper respondent to a petition for a writ of habeas corpus filed by one detained as an "enemy combatant" is the petitioner's immediate custodian, the Court should grant certiorari and schedule argument in this case as well as in *Padilla*, rather than hold the petition pending its ultimate disposition of *Padilla*. This case and *Padilla* raise similar and equally important questions regarding the two aspects of this Court's decision in *Braden v. 30th Jud. Cir. Ct.*, *supra*. Specifically, *Padilla* presents important issues concerning habeas jurisdiction and, in particular, the scope of the Court's holding in *Braden* that a district court may exercise habeas jurisdiction so long as its process can reach the petitioner's custodian. This case presents important issues concerning the Court's holding in *Braden* that venue in a habeas action is determined based upon a weighing of "traditional venue consideration," and not limited to the place of the petitioner's confinement. Both issues should be reviewed by this Court.

As Respondents noted in *Padilla*, because the questions in the two cases overlap in certain respects, the Court may wish to schedule argument during this term if it grants certiorari. Accordingly, Petitioner has filed with the Court a motion for expedited consideration in this case which would allow the Court to consider and decide this case contemporaneously with *Padilla* should it choose to do so.

CONCLUSION

For the reasons set forth above, petitioner Ali Saleh Kahlah al-Marri respectfully requests that the Court grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit or, in the alternative, hold it pending disposition of the *Padilla* case.

Respectfully submitted,

LAWRENCE S. LUSTBERG, ESQ.
Counsel of Record

MARK A. BERMAN, ESQ.
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

Attorneys for Petitioner
Ali Saleh Kahlah al-Marri

Dated: April 9, 2004

360 F.3d 707

United States Court of Appeals,
Seventh Circuit.

Ali Saleh Kahlah AL-MARRI, Petitioner-Appellant,
v.
Donald RUMSFELD, Secretary of Defense, and
M.A. Marr, Commander, Naval Consolidated Brig,
Charleston, South Carolina, Respondents-Appellees.

No. 03-3674.

Argued Feb. 18, 2004.
Decided March 8, 2004.

Mark A. Berman, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ, for Petitioner-Appellant.

K. Tate Chambers, Office of the United States Attorney, Peoria, IL, Paul D. Clement, Washington, DC, for Respondents-Appellees.

Before COFFEY, EASTERBROOK, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

A citizen of Qatar, Ali Saleh Kahlah al-Marri entered the United States on September 10, 2001. He was detained in December 2001 as a material witness believed to have evidence about the terrorist attacks of September 11. While in custody, al-Marri made statements that led to his indictment for lying to the FBI; the grand jury also charged him with using bogus identification to obtain loans. Some of al-Marri's activities took place in Illinois before his arrest and others during his time in the Southern District of New York as a material witness; he chose Illinois as a venue for the criminal proceedings. Before trial could be held, however, President Bush declared

al-Marri to be an enemy combatant affiliated with al Qaeda. Later that day (June 23, 2003), the United States dismissed the indictment and moved al-Marri from Illinois to the Naval Brig in Charleston, South Carolina, for detention and questioning. That Brig is where other persons designated as enemy combatants, including Jose Padilla and Yaser Esam Hamdi, are being held.

Still liking the Central District of Illinois, al-Marri filed there a petition for a writ of habeas corpus. 28 U.S.C. § 2241. Section 2241(a) provides: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." The district judge read "jurisdiction" to refer to the district in which the court sits, rather than its ability to obtain personal jurisdiction over the warden. Charleston is within the District of South Carolina, and the judge held that it is the only court in which al-Marri may contest his custody. 274 F.Supp.2d 1003 (C.D.Ill.2003). Although al-Marri named as respondents the President and Secretary of Defense – anticipating that the district judge might be unwilling to treat the Commander of a military prison in South Carolina as amenable to suit in Illinois – the court was unpersuaded, ruling that the location for a proceeding under § 2241 is the district of the petitioner's custody and not the larger (potentially nationwide) territory in which a custodian may be served with a summons.

Naming the President as a respondent was not only unavailing but also improper, and we have removed his name from the caption. Suits contesting actions of the executive branch should be brought against the President's subordinates. *See Franklin v. Massachusetts,* 505 U.S. 788, 803, 112 S.Ct. 2767, 120 L.Ed.2d 636 (plurality

opinion), 826 (Scalia, J., concurring) (1992). What is more, the President could not be called al-Marri's custodian even if he were otherwise an appropriate litigant. True, the President authorized al-Marri's custody by designating him as an enemy combatant, but there is a difference between authorizing and exercising custody. A judge authorizes custody by imposing a sentence of imprisonment, but this does not make the judge an appropriate respondent in a collateral attack. The legislature that enacted the statute in question, the criminal investigator who found damning evidence, the prosecutor, the grand jurors who returned the indictment, the petit jurors who rendered the verdict, the judge who imposed sentence, the state or federal attorney general, the governor (or President) – these and more play roles in authorizing custody. But for an inmate of a brig, jail, or prison the "custodian" is the person in charge of that institution. *See Hogan v. Hanks,* 97 F.3d 189 (7th Cir.1996). In the federal system, this means the warden (or Commander) rather than the Director of the Bureau of Prisons, the Secretary of the Navy, the Chairman of the Joint Chiefs of Staff, the Attorney General, the Secretary of Defense, or the President.

Commander Marr of the Naval Brig is al-Marri's custodian. Secretary Rumsfeld is Marr's (remote) superior, and no more an appropriate respondent on that account than is the Attorney General when a convicted federal prisoner or an alien detained pending removal seeks a writ of habeas corpus. *See Robledo-Gonzales v. Ashcroft,* 342 F.3d 667, 673 (7th Cir.2003). al-Marri named the Secretary of Defense in the belief that this would facilitate litigation in the Central District of Illinois, but we do not see why it would do so even if the Secretary were his

custodian. Venue in actions against federal officials is controlled by 28 U.S.C. § 1391(e):

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

See also Stafford v. Briggs, 444 U.S. 527, 100 S.Ct. 774, 63 L.Ed.2d 1 (1980). Neither Secretary Rumsfeld nor Commander Marr "resides" in the Central District of Illinois; al-Marri does not reside there either; few if any of the events that determine whether (and how) al-Marri can be held under the law of war and the authority granted by 18 U.S.C. § 4001(a) and *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 1 (1942), occurred in the Central District of Illinois. But if § 2241(a) "otherwise provides," and allows litigation in the forum of the prisoner's choice, then again it is unnecessary to name the Secretary of Defense as a party; Commander Marr, like any other federal official, may be a defendant (in her official capacity) in any district where Congress has authorized the litigation to take place. Whether Secretary Rumsfeld (or Commander Marr) has enough "contacts" with Illinois that litigation could occur in a court of that state consistent with due process is beside the point. An official-capacity suit such as this is against the office, not the person, and every federal office has "contacts" with the whole United States of America. The district court wields the authority of the

United States as a nation rather than of any state. *See Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031 (7th Cir.2000); *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668 (7th Cir.1987). The right question is where § 2241 allows litigation to be conducted. For persons imprisoned by the national government, the answer must be either "the district where the petitioner is confined" or "any of the 94 federal districts"; if the answer is favorable to al-Marri and venue lies every-where, it suffices to name Commander Marr as a respondent. The answer, however, is not favorable to al-Marri.

Long ago the Supreme Court held that the phrase "within their respective jurisdictions" in § 2241's predecessor limits proceedings to the federal district in which the petitioner is detained. *See, e.g., Wales v. Whitney,* 114 U.S. 564, 574, 5 S.Ct. 1050, 29 L.Ed. 277 (1885); *Carbo v. United States,* 364 U.S. 611, 617, 81 S.Ct. 338, 5 L.Ed.2d 329 (1961). This is an assumption underlying 28 U.S.C. § 2255: until that statute directed federal prisoners' post-conviction petitions to the sentencing courts, collateral attacks had been litigated where the prisoners were located. *See United States v. Hayman,* 342 U.S. 205, 212-19, 72 S.Ct. 263, 96 L.Ed. 232 (1952). If § 2241(a) allowed prisoners held in other states to file in the original sentencing districts, § 2255 would have been unnecessary. Likewise § 2241(d), which provides that, when a prisoner sentenced within one part of a state that has multiple federal districts is being held outside that district but still within that state, the petition may be filed in the district where the sentence was imposed. If all 94 federal districts are available to every prisoner all the time, what function

does § 2241(d) serve? Courts ought not read federal statutes in ways that make whole sections nugatory.

Appellate courts regularly dismiss actions under § 2241 filed outside the judicial district that contains the place of the prisoner's detention. *See, e.g., Vasquez v. Reno,* 233 F.3d 688, 691 (1st Cir.2000); *Yi v. Maugans,* 24 F.3d 500, 507 (3d Cir.1994); *In re Hanserd,* 123 F.3d 922, 925 & n. 2 (6th Cir.1997); *Jones v. Biddle,* 131 F.2d 853, 854 (8th Cir.1942); *Blango v. Thornburgh,* 942 F.2d 1487, 1491-92 (10th Cir.1991); *Guerra v. Meese,* 786 F.2d 414, 416 (D.C.Cir.1986). We have taken the same position, not only in *Robledo-Gonzales* and *Hogan* but also in their predecessors. *See, e.g., United States v. Mittelsteadt,* 790 F.2d 39 (7th Cir.1986); *Hanahan v. Luther,* 760 F.2d 148, 151 (7th Cir.1985). These decisions respect the language of § 2241(a) and the holdings of the Supreme Court. They make practical sense as well. Enforcing § 2241(a) as written avoids forum shopping. Although al-Marri chafes at the prospect of litigating in South Carolina, the district court there and its appellate court are no less likely to respect his legal rights than are the courts of this circuit; and if to al-Marri (or his lawyers) it is irksome to litigate in Charleston, imagine the difficulties that would ensue if al-Marri could choose the district courts located in Fairbanks, Minot, San Juan, or Agana. National venue would mean that one idiosyncratic district or appellate court anywhere in the nation could insist that the entire federal government dance to its tune. Requiring prisoners to litigate where they are confined (or, under § 2255, had been sentenced) not only distributes business among the district courts and circuits but also allows important issues to percolate through multiple circuits before the Supreme Court must review a disputed question. *Cf.*

United States v. Mendoza, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984).

Within the last few months, however, two courts of appeals have departed from this approach and held that, by naming a cabinet officer as a respondent, a prisoner may litigate in any of the 94 districts. *See Padilla v. Rumsfeld,* 352 F.3d 695, 704-10 (2d Cir.2003), *cert. granted,* No. 03-1027 (U.S. Feb. 20, 2004) (enemy combatant detained at Charleston Brig); *Ali v. Ashcroft,* 346 F.3d 873, 887-88 (9th Cir.2003) (alien detained pending removal). Neither of these opinions cites *Wales* or *Carbo;* neither devotes more than a passing glance to the language of § 2241(a); neither acknowledges the contrary decisions of other circuits. What both *Padilla* and *Ali* do say is that the cabinet officer is a proper respondent because he played a leading role in the events that led to the detentions. The second circuit wrote: "[a]lthough Commander Marr is the commander of the Brig, the legal reality of control is vested in Secretary Rumsfeld, since only he – and not Commander Marr – could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." 352 F.3d at 707. And the ninth circuit stated: "Petitioners are not merely in the custody of the INS District Director but are subject to a removal order that is based on the Attorney General's interpretation of the statute. Thus, the Attorney General, whose unique role as the ultimate decision-maker is particularly evident here, is the proper respondent." 346 F.3d at 888. Both of these decisions conflate the person responsible for authorizing custody with the person responsible for maintaining custody. Only the latter is a proper respondent. If *Padilla* and *Ali* were correct then the prosecutor, the trial judge, or the governor would be

named as respondents in post-conviction proceedings under § 2241 and § 2254; yet no one believes that to be a sound understanding of these statutes. Certainly it is not the view long maintained by the federal judiciary, and neither *Padilla* nor *Ali* unearthed any clues suggesting that the historical understanding and practice are wrong. These opinions therefore do not persuade us to overrule *Robledo-Gonzales* and its predecessors.

Padilla, Ali, and al-Marri rely principally on *Braden v. 30th Judicial Circuit Court,* 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973). Braden was imprisoned in Alabama under a sentence imposed by a court of that state. He also had been indicted in Kentucky, which planned to defer his trial until Alabama released him. After waiting for three years, Braden filed a petition under § 2241(a) in the Western District of Kentucky, naming as respondent the court in which the indictment was pending and claiming a right to termination of the Kentucky proceedings on the ground that the state had not afforded him a speedy trial. The Court held, first, that Braden was "in custody" on the Kentucky indictment and, second, that the state court was a permissible respondent because it was the institution in charge of the Kentucky proceedings. *Braden* reflects the understanding that a prisoner can be "in custody" simultaneously in multiple jurisdictions – for example, when serving a sentence in State A and scheduled to be handed over to State B to begin a consecutive term, or when a sentence imposed by State C has been used to enhance a term being served in State D. *See, e.g., Garlotte v. Fordice,* 515 U.S. 39, 115 S.Ct. 1948, 132 L.Ed.2d 36 (1995); *Maleng v. Cook,* 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989); Rule 2(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Prisoners

under penal obligation to two jurisdictions may seek collateral relief from both, for a writ of habeas corpus issued against either custodian may well abbreviate the petitioner's stay in custody. One of the "custodians" in these situations is entitled to future rather than immediate physical control of the petitioner, and the respondent then must be a person or institution other than the warden. In order to reach this conclusion in *Braden,* the Court had to overrule *Ahrens v. Clark,* 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), which had held that only the immediate physical custodian is a proper respondent.

What *Padilla* and *Ali* hold, and what al-Marri maintains, is that once *Braden* severed the link between physical detention and "custody," anyone with legal authority to influence the physical custodian's actions may be the respondent, and thus the litigation may be conducted against a Cabinet officer in any district. That's a non sequitur. *Braden* did not hold that litigation about the Kentucky indictment could occur everywhere. It held instead that multiple ongoing custodies imply multiple custodians. Braden sued his Kentucky custodian in Kentucky, just as § 2241(a) provides. Similarly, when custody takes a form other than physical detention – for example, parole or an obligation to report for military service – it is necessary to identify as a "custodian" someone who asserts the legal right to control that is being contested in the litigation. *See, e.g., Strait v. Laird,* 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972); *Schlanger v. Seamans,* 401 U.S. 487, 91 S.Ct. 995, 28 L.Ed.2d 251 (1971). This does not imply that, when there is only one "custody" taking the form of physical detention, anyone other than the warden or equivalent official is a proper respondent. *Braden* itself recognized this, quoting with approval from *Wales,* which

Braden called "the classic statement" of the custody principle. 410 U.S. at 495, 93 S.Ct. 1123. The many cases cited a few paragraphs back – *Vasquez, Yi*, and the others, including those in our circuit – all post-date *Braden* and discuss the limits of that decision. They hold that, when there is only one custody and one physical custodian, that person is the proper respondent, and the district in which the prison is located the proper district, for proceedings under § 2241(a). We adhere to those decisions today.

One final matter requires brief attention. After the United States filed a motion to dismiss al-Marri's indictment in the Central District of Illinois, his lawyer orally opposed "any movement of Mr. Al-Marri until we have an opportunity to file – it will be a habeas corpus action I suspect. . . . [W]e would ask that the Court stay his removal from the Peoria County jail for at least until some time tomorrow so we would have an opportunity to file an appropriate petition with the Court in regard to the transfer to military custody." The district judge denied this motion on the ground that he has no authority to control the place at which the executive branch holds a prisoner. No appeal was taken. According to al-Marri, asking the district court for an injunction against transfer was equivalent to filing a petition under § 2241; and if such a petition had been filed while al-Marri was still in the Central District of Illinois, that would have blocked transfer unless the judge authorized the movement, *see* Fed. R.App. P. 23(a), and even if transfer had been allowed the court would have retained jurisdiction. *See Ex parte Endo,* 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944). But what actually happened, rather than what could have happened, governs. Someone who files a notice of appeal one day after the time expired loses, even if the notice

could have been filed on time. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *Browder v. Director, Department of Corrections, Illinois,* 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). Likewise with a complaint filed one day after the statute of limitations, or a summons attempted to be served in hand one day after the potential defendant left the jurisdiction. *Cf. Burnham v. Superior Court of California,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). What *did* happen is that, after arriving at the Charleston Brig, al-Marri filed a petition in Peoria, Illinois. He does not want the proceedings transferred to Charleston under § 2241(b). It is, he says, Peoria or bust. The district court made the right choice between these alternatives.

AFFIRMED

274 F.Supp.2d 1003

United States District Court, C.D. Illinois.

Ali Saleh Kahlah AL-MARRI, Petitioner,

v.

George W. BUSH, President of the United States of America, Donald H. Rumsfeld, United States Secretary of Defense, and M.A. MARR, Commander, Naval Consolidated Brig, Charleston, South Carolina, Respondents.

No. 03-1220.

Aug. 1, 2003.

L. Lee Smith, Hinshaw & Culbertson, Peoria, IL, Mark A. Berman, Lawrence S. Lustberg, Michael A. Baldassare, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., Newark, NJ, for Petitioner.

Jan Paul Miller, United States Attorney, Springfield, IL, David B. Salmons, U.S. Department of Justice, Office of the Solicitor General, Washington, DC, for Respondents.

Morton Sklar, World Organization Against Torture, USA, Washington, DC, for World Organization Against Torture, USA Amicus Curiae, by special leave of the Court, supporting the Petitioner.

Bruce D. Locher, Springfield, IL, for National Association of Criminal Defense Lawyers, Amicus Curiae, by special leave of the Court, supporting the Petitioner.

ORDER

MIHM, District Judge.

This matter is now before the Court on Petitioner, Ali Saleh Kahlah Al-Marri's ("al-Marri"), Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, and the Government's Motion to Dismiss. For the reasons set forth below, the Motion to Dismiss [# 7] is GRANTED.

BACKGROUND

Al-Marri is a Qatari national who legally entered the United States on September 10, 2001, with his wife and children. He had previously obtained a bachelor's degree from Bradley University in Peoria, Illinois, in the early 1990s, and was returning to the United States to obtain a master's degree from Bradley.

On December 12, 2001, al-Marri was arrested by FBI agents in Peoria at the direction of the U.S. Attorney's Office for the Southern District of New York as a material witness in the investigation of the September 11, 2001, terrorist attacks. He was then transferred to New York City.

Al-Marri was formally arrested on a criminal complaint charging him with credit card fraud on January 28, 2002. On February 6, 2002, he was indicted and charged with possession of 15 or more unauthorized or counterfeit access devices with intent to defraud in the United States District Court for the Southern District of New York. He pled not guilty, and the case followed the normal course of litigation. On January 22, 2003, al-Marri was charged in a second indictment with two counts of making a false statement to the FBI, three counts of making a false

statement in a bank application, and one count of using a means of identification of another person for purposes of influencing the action of a federally insured financial institution. He also entered a plea of not guilty to the second indictment and succeeded in having the two indictments consolidated.

Al-Marri initially waived any objection to venue in the Southern District of New York, but later withdrew his waiver after obtaining new counsel. He then moved to dismiss the indictments on grounds of improper venue. On May 12, 2003, al-Marri's motion was granted and the indictments were dismissed for improper venue. However, a new criminal complaint had been filed under seal in this district on May 1, 2003, and al-Marri was arraigned on that complaint on May 13, 2003. He was then transferred back to Peoria, where a grand jury indicted him on the same counts that had been charged in the two indictments in the Southern District of New York. Al-Marri was arraigned and a pretrial conference was set for July 2, 2003, with a jury trial to begin on July 21, 2003.

On June 23, 2003, President Bush designated al-Marri as an enemy combatant and directed that he be transferred to the control of the Defense Department for detention. That same morning, the U.S. Attorney's Office moved to dismiss the indictment with prejudice, and the motion was granted. Al-Marri's counsel then requested that the Court stay the case to prevent any attempt to transfer him from the jurisdiction until he could file a habeas petition. However, the Court determined that as the case had been dismissed with prejudice, it lacked jurisdiction to issue any type of a stay. The Court did obtain the U.S. Attorney's agreement to inform counsel of the location to which al-Marri was to be moved, and

counsel has been so advised. The U.S. Attorney also agreed to provide both the Court and al-Marri's counsel with advance notice if al-Marri was going to be moved to any location outside of the United States so that counsel could seek an emergency injunction in the appropriate court. Al-Marri was then immediately transferred into military custody and transported to the Naval Consolidated Brig in Charleston, South Carolina, where he continues to be held.

On July 8, 2003, al-Marri's counsel filed the present § 2241 Petition on his behalf, as it is undisputed that al-Marri is unavailable to sign it for himself. In response, the Government moved to either dismiss or transfer the Petition to the District of South Carolina, raising essentially three arguments: (1) the Petition has not been properly brought on al-Marri's behalf; (2) no proper respondent with custody over al-Marri is present within this Court's territorial jurisdiction; and (3) venue over the action appropriately lies in South Carolina, where he is detained. On July 28, 2003, the Court held oral arguments, and this Order follows.

DISCUSSION

A petition seeking habeas corpus relief is appropriate under 28 U.S.C. § 2241 when a defendant is challenging the fact or duration of his confinement. *Preiser v. Rodriguez,* 411 U.S. 475, 490, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); *Waletzki v. Keohane,* 13 F.3d 1079, 1080 (7th Cir.1994). The writ of habeas corpus may be granted where the defendant is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. 2241(c)(3). Al-Marri's ability to pursue relief pursuant to § 2241 is essentially undisputed.

What is disputed is the forum in which he should pursue such relief.[1]

Section 2243 provides that any writ of habeas corpus that shall issue "shall be directed to the person having custody of the person detained" and that person "shall be required to produce at the hearing the body of the person detained." 28 U.S.C. § 2243. Moreover, it is generally established that the proper respondent in a habeas petition is the detainee's immediate custodian. *See Wales v. Whitney,* 114 U.S. 564, 574, 5 S.Ct. 1050, 29 L.Ed. 277 (1885) (noting that the provisions of the habeas corpus statute "contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary"). The Seventh Circuit has followed this view, noting that "[t]he custodian, in most cases, 'is the person having a day-to-day control' over the petitioner, because he 'is the only one who can produce the body of the petitioner.'" *Samirah v. O'Connell,* 335 F.3d 545, 2003 WL 21507968, at *5 (7th Cir.2003), *citing Guerra v. Meese,* 786 F.2d 414, 416 (D.C.Cir.1986). The only noted exceptions to this general rule involved limited circumstances where the prisoner was being held abroad and there was no domestic forum where the prisoner's custodian was present or where the prisoner was being held at an undisclosed location, neither of which apply in

[1] Although the Government asserts several bases for the dismissal of al-Marri's Petition, each of the bases need not be addressed in resolving the motion, as the Court finds the issue of venue to be dispositive.

the present case. *Id.*; *Demjanjuk v. Meese,* 784 F.2d 1114, 1115-16 (D.C.Cir.1986). From this line of cases, the Government argues that the Court should not entertain the Petition, as it must be brought in South Carolina, where Commander Marr, al-Marri's day-to-day custodian, is located.

Al-Marri cites *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), for the proposition that a federal district court has the power to consider a detainee's § 2241 petition so long as the court's process can reach the named respondents. In *Braden,* the Supreme Court took a step back from *Ahrens v. Clark,* 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), which suggested that the prisoner's presence within the territorial confines of the district was an invariable prerequisite to the exercise of a district court's habeas jurisdiction. 93 S.Ct. at 1130. *Ahrens* involved habeas petitions filed by 120 German nationals confined at Ellis Island, New York, pending deportation in which they argued that the statutory removal orders issued by the INS exceeded the President's authority under the Alien Enemy Act of 1789. 68 S.Ct. at 1443. The petitions were filed in the District Court for the District of Columbia, naming the Attorney General as the respondent. *Id.* at 1443-44. The Supreme Court found that the words "within their respective jurisdictions" in the habeas corpus statute limited district court jurisdiction to inquiries into cases brought by those confined or restrained within the territorial jurisdiction of each court. *Id.* at 1444.

In distancing itself from *Ahrens'* inflexible rule, the Supreme Court noted developments in the law since *Ahrens* was decided and criticized a construction that dictated the choice of an inconvenient forum even if the

type of case at issue could not have been foreseen at the time of the decision. *Id.* at 1132. Nevertheless, while the Supreme Court did indicate that "[s]o long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction,'" it later deferred to traditional principles of venue in noting "[o]f course, in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims" and based its finding in part on the fact that the respondent had been properly served in the district in which the petition was filed. *Id.*

Initially, the Court notes that this case presents a quite different procedural posture from *Braden,* in which a petitioner confined in Alabama was allowed to proceed with a habeas corpus petition in Kentucky that challenged his right to a speedy trial on a Kentucky charge after the Court found that the matter centered around a detainer lodged by the state of Kentucky and that the respondent had been properly served in the Western District of Kentucky. Here, al-Marri is not attacking a detainer lodged by an Illinois court while he is incarcerated in South Carolina or otherwise attacking a form of legal custody that is separate and distinct from his present physical custody. In fact, the Central District of Illinois has no real relationship to his present confinement other than the fact that he was physically present in this District prior to his arrest and at the time that he was taken into military custody after having been declared an enemy combatant. His family is no longer in this District or even in the United States, and his lead counsel that have established a relationship with him through months of representation are located in Newark, New Jersey. His involvement as a criminal defendant in this Court ceased with the dismissal

of all charges against him prior to his transfer into military custody, and the fact that he had been a defendant in this Court prior to the time that he was removed from the district is only tangentially related to the circumstances of his present confinement in military custody. There is likewise no indication that any Respondent is physically present within or has been served in the Central District of Illinois, and neither *Braden* nor any Seventh Circuit case known to the Court has addressed or specifically authorized the use of a state's long-arm statute to obtain service as a means of establishing venue in a § 2241 action where the petitioner is confined in another state.

Subsequent to the Supreme Court's decision in *Braden,* the Seventh Circuit has held that "the only court with jurisdiction over [a petition for writ of habeas corpus] is the federal district court where the movant is imprisoned." *United States v. Mittelsteadt,* 790 F.2d 39, 40 (7th Cir.1986). In fact, the Seventh Circuit even cited *Braden* in its subsequent finding that "if a prisoner wants 'out' . . . the proper venue for the habeas corpus proceeding is the district where [the movant] is being held." *Id., citing Braden,* 93 S.Ct. at 1132; *Mikolon v. United States,* 844 F.2d 456, 461 (7th Cir.1988) (noting that petitioner who was incarcerated in Terre Haute, Indiana, and brought his petition in the United States District Court for the Southern District of Indiana, had satisfied jurisdictional and venue requirements.) The Seventh Circuit recently reaffirmed this view in *Samirah,* where it held that if the petitioner was going to proceed under § 2241, "he must name his custodian as respondent and file the petition in a district court that has jurisdiction over his custodian; otherwise, the district court would lack jurisdiction." 335 F.3d 545, 2003 WL 21507968, at *5, *citing Montenegro v.*

United States, 248 F.3d 585, 594 (7th Cir.2001), *overruled on other grounds by Ashley v. United States,* 266 F.3d 671, 674-75 (7th Cir.2001); *see also, Hogan v. Hanks,* 97 F.3d 189, 190 (7th Cir.1996) (finding that if the petitioner is in prison, the warden is the proper respondent); *Hanahan v. Luther,* 760 F.2d 148, 151 (7th Cir.1985). After finding that no custodian was within the district court's territorial limits when the petition was filed, the Court of Appeals concluded that the district court lacked habeas jurisdiction. *Id.*

Granted, neither *Mittelsteadt* nor *Samirah* are closely analogous to the facts of this case. *Mittelsteadt* involved a regular habeas petition challenging a parole determination by a petitioner who had been convicted and was in custody in a federal prison. 790 F.2d at 40-41. *Samirah* involved a petition brought by an alien seeking to compel the INS to allow him to return to the United States. 335 F.3d 545, 2003 WL 21507968, at *1. In fact, the Court is unaware of any case in the Seventh Circuit expressly addressing this type of situation. Rather, the cases appear to either apply the general rule in addressing the normal habeas situation or address a factual situation that is not sufficiently analogous to compel a particular result in this case. However, *Mittelsteadt, Samirah,* and the other cases that have been decided in this circuit do indicate that the general rule that habeas petitions are generally to be filed where the petitioner's custodian is located is well-established in the Seventh Circuit.

Under *Braden's* expanded view of habeas jurisdiction, traditional venue doctrines remain fully applicable, as even in rejecting the inflexible jurisdictional rule of *Ahrens,* the Supreme Court nevertheless reaffirmed the

result in that case as the proper product of traditional principles of venue. 93 S.Ct. at 1132.

> On the facts of Ahrens itself, for example, petitioners could have challenged their detention by bringing an action in the Eastern District of New York against the federal officials who confined them in that district. No reason is apparent why the District of Columbia would have been a more convenient forum, or why the Government should have undertaken the burden of transporting 120 detainees to a hearing in the District of Columbia. Under these circumstances, traditional principles of venue would have mandated the bringing of the action in the Eastern District of New York, rather than the District of Columbia.

93 S.Ct. at 1132. The Court finds this to be instructive.

Here, there is no secret as to where al-Marri is being held or that he is being held in military custody in Charleston, South Carolina, which is within the continental United States. He no longer has substantial ties to the Central District of Illinois, as his family is believed to have left the country, and his lead counsel are located in New Jersey. Under these circumstances, the question then becomes whether there is anything about this case that compels the Court to depart from the general rule and allow the petition to be entertained in a district where neither the petitioner, nor his family, nor lead counsel, nor any Respondent is located. Somewhat regretfully, the Court must conclude that the answer is no.

Al-Marri resists transfer to the District of South Carolina, where he asserts that "it appears, meaningful

relief will almost certainly be foreclosed" and cites *Hamdi v. Rumsfeld,* 316 F.3d 450 (4th Cir.2003).[2] However, the fact that the Fourth Circuit has denied relief in the case of another petitioner that has been designated as an enemy combatant really has no bearing on the question of venue in this case and presumes without any appreciable basis therefore that the Fourth Circuit would not give al-Marri's petition (which differs in several material respects from the situation in *Hamdi*) independent consideration. Whether the law of another forum may be more or less favorable cannot be determinative of venue, or the habeas inquiry would be reduced to little more than forum shopping for a better outcome.

Al-Marri argues that his choice of forum "must be accorded substantial deference." While the Court would generally agree with that assertion if this were a routine civil case, this is a habeas corpus proceeding, and it is axiomatic that not all general principles of civil law apply, for obvious reasons. Al-Marri has not provided, and the Court is otherwise unaware of, any support for the extension of this concept to the realm of habeas corpus proceedings as justification for defeating well-established principles of venue in habeas cases compelling another result.

Al-Marri attempts to persuade the Court to follow the reasoning of *Padilla v. Rumsfeld,* 233 F.Supp.2d 564

---

[2] Parenthetically, the Court notes that the timing of the events that unfolded on the morning that the criminal charges in this district were dismissed, al-Marri's immediate turn-over to military custody, and his swift transport from this district to South Carolina suggest that the Government may have been conscious of forum issues as well.

(S.D.N.Y.2002), in which the district court heard the petition in New York and declined to transfer the case to South Carolina, where Padilla was being confined. However, this portion of the non-binding opinion in *Padilla* is extremely brief and can be readily distinguished on several bases, not the least of which is the fact that Padilla's counsel, who had been working to obtain his release prior to his transfer to South Carolina, were located in New York. *Id.* at 587. It is clear from the opinion that the district judge in that case considered this to be a key fact, as he stated that "the convenience of counsel is served by keeping the case here" and reiterated that "considerations of convenience and practicality . . . are served by keeping the case here." *Id.* Here, the counsel with whom al-Marri has an established relationship are located in New Jersey, and it is presumably just as convenient, if not more so, for them to travel to South Carolina.

Al-Marri also contends that the material events charged in the indictment which led to his designation by President Bush as an enemy combatant took place in this district and that records/witnesses pertinent to the claim are likely to be found here. However, this is primarily speculation. Although it appears that al-Marri resided in Peoria for a substantial part of the time that he was in this country, there was a lengthy period of time between the time he obtained his bachelor's degree and his return on September 10, 2001, when he was not in the United States. The Court has no basis for determining whether the facts upon which he has been designated an enemy combatant center upon conduct that al-Marri allegedly engaged in while inside or outside of the country, or both. Although the Court's inability to make this determination is attributable to the fact that the Government has not

divulged the specific details underlying the decision to designate him as an enemy combatant, this does not entitle al-Marri to the inference he asks the Court to draw.

After careful review and scrupulous consideration, the Court concludes that there is nothing about this situation or the relief al-Marri requests that causes the Court to deviate from traditional principles of venue in habeas cases. This is not a situation where the petitioner's whereabouts are unknown or where he is being held outside the confines of the United States. Al-Marri is being held in the naval brig in Charleston, South Carolina. There is a district court there. His immediate custodian is there, and the Court has been assured by the Assistant Solicitor General of the United States and the U.S. Attorney for this district that Commander Marr would obey any court order directed to her for execution.

Nor is there anything about al-Marri's claims or relief sought that compels venue in the Central District of Illinois. His argument that he is being held unconstitutionally centers on his confinement in South Carolina. His request for a declaration that the President's designation of him as an enemy combatant and the Military Order of November 13, 2001, are invalid and void involves a challenge to actions taken in the District of Columbia, does nothing to tie venue to this district, and can be addressed just as easily in South Carolina. Any order directing Secretary Rumsfeld to release him from custody or prohibiting his removal from the United States would be implemented in either the District of Columbia or South Carolina, as he is not in custody in the Central District of Illinois. Al-Marri also seeks a copy of the Petition, access to counsel, access to Qatari consular officers, access to

representatives of the International Committee for the Red Cross, conditions of confinement that are not harmful to his mental or physical well being, conditions of confinement that do not deprive him of constitutional rights normally afforded to pretrial detainees such as the right to freely exercise his religion, and a restriction on his being interrogated outside the presence of counsel; these requests presently relate solely to the conditions and circumstances of his confinement in South Carolina and have no relationship whatsoever with the Central District of Illinois.

Despite the fact that none of the relief sought in al-Marri's Petition is directly related to this district, he maintains that he is entitled to seek relief here because the Government's actions in removing him from this district were unseemly. With all due respect, whether his removal from this district was or was not unseemly is not an issue for this Court to resolve. While the Court fully understands why he would like to have his Petition heard in a circuit that has not yet addressed a challenge to the detention of an individual designated as an enemy combatant, al-Marri's hope for a more favorable result in the Seventh Circuit is not enough to justify an exception to the general rule set forth in *Mittelsteadt* that habeas cases should be brought in the district of confinement. After applying traditional principles of venue in habeas cases, the Court concludes that the Central District of Illinois is not the proper venue for this action, and the merits of al-Marri's Petition should not be entertained in this district.

After announcing this conclusion during oral argument on July 28, 2003, the Court asked counsel for al-Marri whether they would prefer to have the Petition dismissed without prejudice in order to facilitate an

immediate appeal or have the Petition transferred to the District of South Carolina. As counsel has now informed the Court that they prefer dismissal, the Court finds that al-Marri's petition shall be dismissed without prejudice.

CONCLUSION

For the reasons set forth herein, the Government's Motion to Dismiss [# 7] is GRANTED, and al-Marri's Petition for Writ of Habeas Corpus pursuant to § 2241 is DISMISSED WITHOUT PREJUDICE. All other pending motions are now DENIED AS MOOT, and this matter is TERMINATED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ALI SALEH KAHLAH AL-MARRI, Petitioner, v. GEORGE W. BUSH, President of the United States of America, DONALD H. RUMSFELD, United States Secretary of Defense, and M.A. MARR, Commander, Naval Consolidated Brig, Charleston, South Carolina, Respondents.	)	Case No. 03-1220

ORDER

(Filed Aug. 25, 2003)

This matter is now before the Court on Petitioner, Ali Saleh Kahlah al-Marri's ("al-Marri"), Motion for Reconsideration from the dismissal of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. For the reasons set forth below, the Motion for Reconsideration [#20] is DENIED.

DISCUSSION

"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale de Credit v. CBI Industries*, 90 F.3d 1264, 1269 (7th Cir. 1996). Furthermore, it is not appropriate to argue matters that could have been raised in prior motions or rehash previously rejected arguments in a motion to reconsider. *Id.* at 1270.

Al-Marri seeks reconsideration of the Court's Order dismissing his habeas corpus petition on venue grounds. Specifically, he asserts that the Court misapprehended the Seventh Circuit's decision in *United States v. Mittelsteadt*, 790 F.2d 39 (7th Cir. 1986), and interpreted it inconsistently with the Supreme Court's decision in *Braden v. Thirtieth Judicial Circuit Court*, 410 U.S. 484, 93 S.Ct. 1123 (1973). He also suggests that the Court erred in deciding the venue question prior to addressing questions of territorial jurisdiction.

With respect to the latter contention, the Court notes that the order in which the Court intended to address the issues presented in al-Marri's Petition was set forth at the beginning of the hearing. Although counsel had every opportunity to argue that questions of jurisdiction must be reached before questions of venue, counsel indicated that they had no objection to proceeding first with the venue issues. Thus, this argument attempts to present matters that could have been raised previously, and is inappropriately raised in a motion to reconsider. Moreover, it is appropriate to determine questions of venue prior to jurisdictional issues "where there is a sound prudential justification for doing so," such as where the question of venue is clear under the well-established law of the circuit, and the jurisdictional issue involves a novel question of constitutional law. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979). Such was the case here.

Al-Marri's suggestion that the Court interpreted *Mittelsteadt* in an manner that conflicts with the Supreme Court's decision in *Braden* amounts to little more than a rehashing of a previously rejected argument. As the Court indicated in its prior Order, the Supreme Court in *Braden* ultimately deferred to traditional principles of venue in

noting that "in many instances the district in which petitioners are held will be the most convenient forum for the litigation of their claims" and based its finding in part on the fact that the respondent had been properly served within the district in which the petition was filed. 93 S.Ct. at 1132. Again, al-Marri's case presents a quite different procedural posture from *Braden*, in which a petitioner confined in one state was allowed to challenge a detainer issued by another state in the district court for the state that had issued the detainer.

Al-Marri is neither attacking a detainer lodged by any court in this state, nor otherwise attacking a form of legal custody arising in and being imposed by the state of Illinois that is separated and distinct from his present physical custody. In fact, other than the speculative assertion that some of the predicate acts for which he was designated an enemy combatant may have transpired in this district,[1] the Central District of Illinois has no real relationship to his present confinement, as his family is no longer in this District, and his lead counsel who have established a relationship with him through months of representation are located in Newark, New Jersey. His involvement as a criminal defendant in this Court (which

[1] As the Court indicated in its prior Order, the Court has no non-speculative basis for concluding where the material events underlying his designation as an enemy combatant took place or where pertinent records and witnesses are likely to be found, due to the fact that al-Marri was not physically present in this District for a substantial amount of time, as well as the fact that the predicate acts upon which he was so designated are not before the Court. Nor is there any basis for concluding that this forum is more convenient for the parties, who are physically located in South Carolina, New Jersey, and the District of Columbia. *See Braden*, 93 S.Ct. at 1129.

centered on his alleged conduct while within this district) ceased with the dismissal of all charges against him with prejudice prior to his transfer into military custody, and the fact that he had been a defendant in this Court prior to the time that he was removed from the district is only tangentially related to the circumstances of his present confinement in military custody. There is likewise no indication that any Respondent is physically present within or has been served in the Central District of Illinois.

In *Mittelsteadt,* which was decided after the Supreme Court's decision in *Braden* and even cited the case in support for its holding, the Seventh Circuit held that "the only court with jurisdiction over [a petition for writ of habeas corpus] is the federal district court where the movant is imprisoned." 790 F.2d at 40. This view was recently reaffirmed in *Samirah v. O'Connell,*___F.3d___, 2003 WL 215079968 (7th Cir. 2003), where the Seventh Circuit held that a § 2241 petitioner generally, "must name his custodian as respondent and file the petition in a district court that has jurisdiction over his custodian; otherwise, the district court would lack jurisdiction." 2003 WL 21507068, at *5.

Even if the Court were to look solely to *Braden* to decide the question of venue in this case, the result would be the same, as *Braden* makes it clear that traditional venue doctrines remain fully applicable. 93 S.Ct. at 1132. Al-Marri has presented the Court with no legitimate basis for concluding that this case presents circumstances sufficient to justify treating it as anything other than a standard habeas petition. He is not being held at an undisclosed location and remains within the continental United States. Al-Marri is being held in the naval brig in

Charleston, South Carolina. His immediate custodian is there, and the Court has been assured by the Assistant Solicitor General of the United States and the U.S. Attorney for this District that this custodian would obey any court order directed to her for execution. South Carolina is also the location where the conditions of confinement of which he complains are being imposed and implemented. He no longer has substantial ties to the Central District of Illinois, and the counsel with whom he has an established relationship are located in New Jersey. Moreover, nothing about al-Marri's claims or the relief sought compels venue in the Central District of Illinois. In fact, the Court exhaustively examined each prayer for relief in its prior Order, and each prayer either was not tied to any particular venue, specifically centered on particular aspects of his confinement in South Carolina, or challenged actions taken in the District of Columbia.

Contrary to al-Marri's assertion, the Court did not abandon traditional principles of venue and apply a "black-letter rule" that "conflated" jurisdiction and venue. Rather, the Court scrupulously analyzed the facts and considerations of this case, before concluding that these factors did not establish any justification for treating this case as an exception to the well-established law of this circuit with respect to venue in habeas corpus cases where a petitioner is challenging his physical detention in another state. The Court did not reject the suggestion that the Petition might be within its jurisdiction. In fact, the Court did not reach the jurisdictional issue at all; al-Marri's argument to the contrary misconstrues the contest of the August 1, 2003, Order.

The Government correctly observes that while this case involves the somewhat unique circumstances surrounding

al-Marri's designation as an enemy combatant, it nevertheless involves a classic use of the writ of habeas corpus to challenge his present physical detention in South Carolina. And as a classic use of the writ, traditional principles of venue in habeas corpus cases compel the result reached by the Court in dismissing the present Petition.

CONCLUSION

For the reasons set forth herein, al-Marri's Motion for Reconsideration [#20] is DENIED.

ENTERED this 25th day of August, 2003.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

- vs -

GEORGE W. BUSH, President of the United States of America, DONALD H. RUMSFELD, United States Secretary of Defense, and M.A. MARR, Commander, Naval Consolidated Brig, Charleston, South Carolina,

Respondents.

Civ. No. 03-1220

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241 WITH REQUEST FOR TEMPORARY RESTRAINTS

Upon the Order of the President of the United States, Petitioner Ali Saleh Kahlah al-Marri is being held in the custody of the Secretary of Defense, without charge and without recourse, in violation of his rights under the Constitution, laws, and treaties of the United States. Accordingly, this Court should issue a Writ of Habeas Corpus.

PARTIES

1. Petitioner Ali Saleh Kahlah al-Marri, a citizen of the State of Qatar, is currently incarcerated unlawfully, without charge, at the Naval Consolidated Brig, in Charleston, South Carolina. He previously was a defendant in a criminal case pending before the Honorable Michael M. Mihm, United States District Judge for the Central District of Illinois.

2. Respondent George W. Bush is the President of the United States of America and Commander-in-Chief of the Armed Forces who, on June 23, 2003, directed the Attorney General to surrender Petitioner to the custody of the Secretary of Defense, and ordered the Secretary of Defense to detain Petitioner as an "enemy combatant."

3. Respondent Donald H. Rumsfeld is the Secretary of Defense of the United States of America, and currently has custody over Petitioner.

4. Respondent M.A. Marr, a Commander in the United States Navy, is in command of the Naval Consolidated Brig in Charleston, South Carolina, at which Petitioner is incarcerated.

JURISDICTION

5. Petitioner brings this action under 28 U.S.C. § 2241 and invokes this Court's jurisdiction under 28 U.S.C. §§ 1331, 1350, 1651, 2201 and 2202, as well as Articles I and III of, and the Fifth and Sixth Amendments to, the Constitution of the United States.

VENUE

6. Venue is proper in the United States District Court for the Central District of Illinois because agents of the Respondents came into this district, took petitioner into their custody, and unlawfully removed Petitioner from this Court's jurisdiction. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493-94 (1973) (holding that traditional venue considerations apply to habeas cases); *Ex parte Mitsuye Endo*, 323 U.S. 283, 304-306 (1944) (holding that district court may act upon

petition for habeas corpus if there is a respondent within reach of its process who has custody of the prisoner, even though petitioner had been removed from the district).

STATEMENT OF FACTS

7. On September 10, 2001, Petitioner lawfully entered the United States, with his wife and five children, for the purpose of obtaining a master's degree from Bradley University in Illinois, the same institution from which he had earned a bachelor's degree in 1991.

8. On December 12, 2002, Petitioner was arrested by the Federal Bureau of Investigation ("FBI") in Peoria, Illinois, at the direction of the United States Attorney's Office for the Southern District of New York, as a material witness in the government's investigation of the terrorist attacks of September 11, 2001. Thereafter, Petitioner was flown by the FBI from Peoria to New York City.

9. Despite the fact that he was never charged with any terrorism-related offenses, Petitioner was held under *extremely coercive* conditions in the Peoria County Jail, in the Special Housing Unit of the Metropolitan Correctional Facility, New York (MCC-NY), and again in the Peoria County Jail. In particular, Petitioner was held in solitary confinement, locked down without exercise or recreation, under constant monitoring, and denied all contact with his family and, since on or about May 29, 2003, access to counsel.

10. On January 28, 2002, the government formally arrested Petitioner on a criminal complaint, charging him with credit card fraud.

11. On February 6, 2002, the government charged Petitioner in a one-count indictment with possession of 15 or more unauthorized or counterfeit access devices, with intent to defraud, in violation of 18 U.S.C. § 1029(a)(3). The case was assigned to the Honorable Victor Marrero, United States District Judge for the Southern District of New York.

12. On February 8, 2002, Petitioner entered a plea of "not guilty" to the indictment and thereby asserted his innocence.

13. The case was litigated in the normal course, during which time the government repeatedly endeavored to elicit Petitioner's cooperation, promising an improvement in the conditions of his confinement in return for his assistance.

14. On January 22, 2003, when Petitioner continued to assert his innocence to the charge against him, he was charged in a second, six-count indictment with two counts of making a false statement to the FBI, in violation of 18 U.S.C. § 1001, three counts of making a false statement in a bank application, in violation of 18 U.S.C. § 1014, and one count of using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. § 1028(a)(7). This second indictment was assigned to the Honorable Denise L. Cote, United States District Judge for the Southern District of New York.

15. On January 24, 2003, Petitioner entered a plea of "not guilty" to the second indictment and thereby asserted his innocence.

16. During the pendency of the Southern District of New York indictments, Petitioner was at all times represented by counsel.

17. In light of difficulties attendant to meeting with Petitioner in the MCC, and in order to have a meaningful opportunity to prepare Petitioner's defense with his assistance, on March 4, 2003, defense counsel moved before Judge Marrero for leave to meet with Petitioner in the federal courthouse. The government objected to counsel's application, *see* Application, Response, and Reply (attached as Exhibits 1-3), but on March 21, 2003, Judge Marrero granted defense counsel's application.

18. On March 28, 2003, Petitioner moved to consolidate the indictments.

19. On April 23, 2003, Petitioner moved to dismiss the indictments on the ground that all of the conduct charged was alleged to have taken place in the Central District of Illinois and, hence, venue was constitutionally improper in the Southern District of New York.

20. On April 24, 2003, Judge Marrero granted Petitioner's motion to consolidate the cases.

21. On May 7, 2003, at the request of the government, Petitioner and counsel met with David N. Kelley, Deputy U.S. Attorney for the Southern District of New York. At that time, Mr. Kelley informed Petitioner that, if he insisted on dismissing the Southern District of New York indictments, and continuing in his assertion of innocence, the circumstances of his confinement, which were already severe, would be further aggravated.

22. Petitioner remained resolute in his claim of innocence to the charges against him.

23. On May 12, 2003, Judge Marrero granted Petitioner's motion and dismissed the Southern District of New York indictments for unconstitutional venue.

24. On May 13, 2003, Petitioner was arraigned in the Southern District of New York on a new criminal complaint that had been filed in the Central District of Illinois under seal on May 1, 2003.

25. On or about May 20, 2003, Petitioner was transferred from MCC-NY to the Peoria County Jail, without any of his personal belongings (including his prayer rug and Koran), legal papers, or commissary funds.

26. By letter to Assistant U.S. Attorney Jonathan Kolodner and MCC Warden Gregory L. Parks, dated May 27, 2003, counsel demanded the immediate return of Petitioner's property, legal papers, and commissary funds.

27. On May 22, 2003, a grand jury sitting in the Central District of Illinois returned a new indictment against Petitioner alleging the same seven counts as had been charged in the dismissed Southern District of New York indictments.

28. On May 29, 2003, Petitioner was arraigned before the Honorable John A. Gorman, United States Magistrate Judge for the Central District of Illinois. Petitioner entered a plea of "not guilty" to the indictment and thereby asserted his innocence to the charges.

29. Judge Gorman set a pretrial conference date of July 2, 2003, and a trial date of July 21, 2003 before the Honorable Michael M. Mihm, United States District Judge for the Central District of Illinois.

30. Following the arraignment, the federal prosecutors handed to defense counsel a copy of so-called Special Administrative Measures ("SAM") (attached as Exhibit 4) which were imposed against Petitioner on or about May 16, 2003. For the preceding year and a half during which Petitioner was incarcerated, the government had not imposed any such measures. Among other restrictions, the SAM:

A. imposed an absolute bar to attorney-client contact unless Petitioner's counsel signed an "Attorney Affirmation;"

B. mandated that defense counsel must be "verified and documented" by at least one and possibly two United States Attorneys before being permitted to represent Petitioner;

C. required attorneys and others on the defense team to submit to government background checks;

D. imposed an *absolute* ban on contact visits between Petitioner and his attorneys;

E. suggested that the government planned to monitor attorney-client communications; and

G. imposed additional severe restrictions on the conditions of Petitioner's confinement which were plainly contrary to the presumption of innocence and infringed the constitutional rights retained by pretrial detainees.

31. During the entire time Petitioner was incarcerated at the Peoria County Jail, he was held in solitary confinement, and denied access to counsel, consular officers, his wife and children, reading materials, recreation,

appropriate medical treatment, and religious items. For example, defense counsel was denied permission to deliver a Koran to Petitioner and, instead, was directed by the Office of the U.S. Attorney to give it to the FBI; the FBI never delivered the Koran to Petitioner.

32. By letter dated June 4, 2003 (attached as Exhibit 5), counsel objected to the SAM on the ground that their stated objective was pretextual, their true purpose was retaliatory, and their imposition violated Petitioner's constitutional rights as a pre-trial detainee, including his Fifth Amendment right to due process and his Sixth Amendment right to the assistance of counsel. Defense counsel proposed to the government less restrictive measures that would accommodate Petitioner's rights and the government's stated concerns.

33. Defense counsel was informed on numerous occasions by personnel of the United States Attorney's Offices for the Southern District of New York and the Central District of Illinois that they had considered the SAM compromise and were awaiting approval by the Department of Justice in Washington.

34. On June 18, 2003, defense counsel filed pretrial motions on Petitioner's behalf seeking an Order: 1) severing one false statement count (Count Six) from the indictment; 2) suppressing evidence seized, and statements allegedly obtained, from Petitioner on December 11, 2001, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States; 3) directing the government to provide the defense with a bill of particulars clarifying certain flaws in the indictment; and 4) compelling the government to provide specific

documentation relating to fingerprint analyses performed by the FBI, which had been withheld from the defense.

35. On the afternoon of Friday, June 20, 2003, Judge Mihm directed the parties via telephone to be prepared to proceed with an evidentiary hearing on July 2, 2003, in connection with Petitioner's pretrial motions, and to confer regarding the witnesses who would testify at such a hearing.

36. That same afternoon, defense counsel informed Assistant United States Attorney Patrick J. Chesley by telephone that, unless Department of Justice approval of a compromise on the SAM could be secured by Monday, June 23, 2003, defense counsel intended to move the Court to resolve the SAM issue so that counsel would have sufficient time to confer with Petitioner in advance of the July 2, 2003 suppression hearing.

37. On Monday morning, June 23, 2003, at approximately 9:05 a.m., defense counsel became aware that United States Attorney Jan Paul Miller was en route to Judge Mihm's chambers. That morning, the government moved ex parte to dismiss the indictment without prejudice based upon a redacted declaration, signed by Respondent Bush (attached as Exhibit 6) which, among other things:

A. Designates Petitioner as an enemy combatant;

B. Directs the Attorney General to surrender Petitioner to the Secretary of Defense;

C. Directs the Secretary of Defense to detain Petitioner as an enemy combatant.

38. When defense counsel requested an opportunity to file a brief in response to the government's application, the United States Attorney amended the government's motion to dismiss the indictment *with* prejudice. The Court then concluded that it was without discretion to deny the government's request and entered an Order (attached as Exhibit 7) dismissing the indictment against Petitioner with prejudice.

39. Defense counsel orally moved the Court to stay any transfer of Petitioner pending the filing of a habeas petition challenging Respondents' actions. The Court denied counsel's motion but directed the United States Attorney to inform defense counsel of the location Petitioner was to be moved.

40. Petitioner was then immediately taken from the custody of the United States Marshals Service at the Peoria County Jail, into the custody of Respondent Rumsfeld and, according to the government, was immediately removed from this district and transported to the Naval Consolidated Brig in Charleston, South Carolina, which is under the command of Respondent Marr. Petitioner remains there, where he is held incommunicado.

41. By letters to the Attorney General and Secretary of Defense dated June 23, 2003, defense counsel demanded access to Petitioner, and requested an immediate response if such access was to be denied.

42. Neither the Attorney General nor the Secretary of Defense has responded to counsel's request.

43. On June 24, 2003, the government finally returned Petitioner's property, including his prayer rug, Koran, and legal papers, to defense counsel. That same

day, the FBI delivered to defense counsel letters and other correspondence addressed to Petitioner at the Peoria County Jail, including attorney-client communications, which had been confiscated by the FBI and never delivered to Petitioner. Included in the these [sic] materials were Jail Incident Reports (attached as Exhibit 8), not previously provided to counsel, which attest to the severe and unconstitutional conditions under which Petitioner was being detained in the Peoria County Jail.

CLAIMS AS TO THE UNLAWFULNESS OF PETITIONER'S DETENTION

FIRST CLAIM

44. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

45. On September 18, 2001, Congress issued the Authorization for the Use of Military Force (the "Joint Resolution") (attached as Exhibit 9), which provides, in pertinent part:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

46. On November 13, 2001, the President issued a military order ("Military Order") (attached as Exhibit 10) purporting to implement the Joint Resolution. The President directed the Secretary of Defense to detain:

> [A]ny individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
>
> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened to cause, or have as their aim to cause, injury or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described [above].

47. The President may only exercise those powers delegated to him by the Constitution and Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (holding that a war-time presidential order to seize the nation's steel mills was unconstitutional and that the President only possesses the power granted by the Constitution and Congress).

48. The President lacks constitutional or other legal authority to unilaterally designate an individual captured on American soil as an enemy combatant, to detain such person without charge or judicial review, to deny such person his due process and other constitutional rights, or to create military commissions for the purpose of trying persons lawfully present on American soil when the

federal courts of the United States have been open and functioning in a normal manner.

49. Neither the Constitution nor the laws and treaties of the United States, including Congress' Joint Resolution, authorizes Respondent Bush's Military Order of November 13, 2001, his designation of Petitioner as an enemy combatant, Respondent Rumsfeld's continued detention of Petitioner, or the denial of Petitioner's due process and other constitutional rights.

50. This usurpation of power by the Executive Branch is unprecedented in American history, threatens individual rights, undermines the structure of our government, and constitutes the type of unbridled authority against which the Constitution was intended to guard. *See Ex Parte Milligan*, 71 U.S. 2, 119 (1866) (reversing as unconstitutional death sentence imposed by military commission during Civil War, because civil courts were open and unobstructed); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (holding that civilian arrested on American soil may not be tried before military tribunal).

51. Therefore, the President's order to detain Petitioner as an enemy combatant, and the Secretary of Defense's detention of Petitioner, are illegal and unconstitutional.

SECOND CLAIM

52. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

53. Petitioner is in fact a civilian, not a combatant, and was treated as such by Respondents for over one year and a half.

54. Therefore, the President's order to detain Petitioner as an enemy combatant, and the Secretary of Defense's detention of Petitioner, are illegal and unconstitutional.

55. Petitioner is entitled to a hearing at which Respondents are compelled to present evidence establishing by a constitutionally appropriate legal standard, more demanding than "some evidence," that Petitioner is, in fact, a combatant, and at which Petitioner is afforded all of the rights set forth in the Fourth, Fifth and Sixth Amendments, to which he would have been entitled at a trial on the criminal indictment dismissed by the government with prejudice on June 23, 2003, including the right to suppress unlawfully seized evidence, to confront and cross-examine witnesses, to subpoena witnesses in his favor, to be informed of the charges against him, and to the assistance of counsel in his defense.

THIRD CLAIM

56. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

57. Petitioner is being held by Respondent Rumsfeld without charge and without process. The government has stated that it intends to hold Petitioner indefinitely.

58. It is a violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States to hold any person without charge.

59. Therefore, the President's order to detain Petitioner as an enemy combatant, and the Secretary of Defense's detention of Petitioner, are illegal and unconstitutional.

FOURTH CLAIM

60. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

61. As a result of Respondents' actions, Petitioner faces an indefinite loss of liberty and, perhaps, death.

62. Petitioner was and remains entitled to all of the rights and privileges afforded to persons under the Bill of Rights, including but not limited to the right to due process of law, which encompasses the right to a presumption of innocence absent proof by the government which satisfies a constitutionally appropriate legal standard, the right to be informed of the charges on which he is held, the right to a fair and speedy trial, the right to the effective assistance of counsel, the right to confront accusers, the right to subpoena witnesses, the right to participate meaningfully in the preparation of a defense, and the privilege against compelled self-incrimination.

63. These rights may not be abolished or denied by Executive fiat such as the President's Military Order of November 13, 2001.

64. This limitation on Executive authority exists even at times of crisis:

> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our

> fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew – the history of the world told them – the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb. . . .
>
> *Ex Parte Milligan*, 71 U.S. 2, 120-25 (1866).

65. Petitioner is being denied his constitutional rights by Executive fiat. Nor may Congress lawfully deny Petitioner his constitutional rights.

66. Therefore, the President's Military Order of November 13, 2001, the President's June 23, 2003 order to detain Petitioner as an enemy combatant, and the Secretary of Defense's detention of Petitioner, are illegal and unconstitutional.

FIFTH CLAIM

67. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

68. Only Congress may suspend the Writ of Habeas Corpus. U.S. Const. Art. I, § 8, cl. 2.

69. Only Congress may, within constitutional limits, regulate the jurisdiction of the federal courts. U.S. Const. Art. III, § 2, cl. 1-2.

70. Congress has not suspended the Writ of Habeas Corpus or otherwise limited the jurisdiction of the federal courts to review the actions of Respondents in this case.

71. Section 7(b)(2) of the President's Military Order of November 13, 2001 provides that an individual detained under that order "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."

72. To the extent the President's Military Order purports to disallow any challenge to the legality of Petitioner's detention by way of habeas corpus or other means for seeking review by the federal courts, the Military Order and its implementation by Respondent Rumsfeld constitute an unlawful Suspension of the Writ, and otherwise constitute an unlawful usurpation of power by the Executive Branch, in violation of Articles I and III of the Constitution of the United States.

73. Therefore, the President's order to detain Petitioner as an enemy combatant, and the Secretary of Defense's detention of Petitioner, are illegal and unconstitutional.

SIXTH CLAIM

74. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

75. Article 36 of the Vienna Convention on Consular Relations, to which both the United States and Qatar are parties, provides as follows:

> COMMUNICATION AND CONTACT WITH NATIONALS OF THE SENDING STATE
>
> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on

behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

76. Under this Article 36 of the Vienna Convention, the United States of America is obligated to allow consular access to any foreign national who "is arrested or committed to prison or to custody pending trial *or is detained in any other manner.*"

77. The United States is obligated under the terms of the Vienna Convention to "enable full effect to be given to the purposes for which the rights accorded under this Article are intended."

78. The United States of America routinely demands from foreign nations that they respect and honor the right of Americans detained overseas to meet with American consular officials.

79. Respondents have denied Petitioner his right to visit, consult, and correspond with Qatari consular officials since at least May 29, 2003.

80. Therefore, the President's order to detain Petitioner as an enemy combatant, and the Secretary of Defense's detention of Petitioner, are illegal and unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that the Court enter an Order:

1) declaring that Petitioner is being held in violation of the Constitution, laws, and treaties of the United States;

2) declaring that the President's designation of Petitioner as an enemy combatant is invalid as a matter of law;

3) declaring that the President's Military Order of November 13, 2001, which purports to establish military commissions for offenses committed on United States soil, is null and void;

4) declaring that, to the extent the Military Order of November 13, 2001 purports to suspend the Writ of Habeas Corpus or otherwise restrict review by the federal court of Petitioner's detention by Respondents, it is null and void; and

5) directing Respondent Rumsfeld to release Petitioner from custody.

IT IS FURTHER REQUESTED that, pending its final disposition of the instant Petition, the Court enter an Order (in the form attached hereto as Exhibit 11), directing Respondent Rumsfeld to:

1) ensure that that Petitioner is not removed from the United States;

2) provide Petitioner with a copy of this Petition;

3) allow Petitioner access to counsel;

4) allow Petitioner access to Qatari consular officers;

5) allow Petitioner access to representatives of the International Committee for the Red Cross;

6) ensure that the conditions of Petitioner's confinement are not harmful to his mental or physical well being;

(7) ensure that Petitioner is not deprived of constitutional rights normally afforded to pretrial detainees, including his rights under the First Amendment to freely exercise his religion; and

(8) ensure that Petitioner is not interrogated outside the presence of counsel.

Petitioner respectfully requests that the Court set a schedule pursuant to which the complex issues raised by this Petition shall be briefed by the parties.

In addition, Petitioner respectfully requests that the Court schedule a hearing at which Respondents are compelled to present evidence establishing that Petitioner is, in fact, an enemy combatant, and at which Petitioner is afforded an opportunity to challenge such designation.

A form of Order with temporary restraints is attached hereto.

Respectfully submitted,

s/ Mark A. Berman

Lawrence S. Lustberg, Esq.
Mark A. Berman, Esq.
Michael A. Baldassare, Esq.
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5496
(973) 596-4753

L. Lee Smith, Esq.
HINSHAW & CULBERTSON
ATTORNEYS-AT-LAW
456 Fulton Street, Suite 298
Peoria, Illinois 61602-1220
(309) 674-1025

Dated: July 7, 2003

THE WHITE HOUSE
WASHINGTON

TO THE SECRETARY OF DEFENSE AND THE ATTORNEY GENERAL:

Based on the information available to me from all sources,

REDACTED

(Filed June 23, 2003)

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

(1) Ali Saleh Kahlah al-Marri, who is under the control of the Department of Justice, is, and at the time he entered the United States in September 2001 was, an enemy combatant;

(2) Mr. al-Marri is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;

(3) Mr. al-Marri engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;

(4) Mr. al-Marri possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if

communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;

(5) Mr. al-Marri represents a continuing, present, and grave danger to the national security of the United States, and detention of Mr. al-Marri is necessary to prevent him from aiding al-Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;

(6) if [sic] is in the interest of the United States that the Secretary of Defense detain Mr. al-Marri as an enemy combatant; and

(7) it is, REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. al-Marri as an enemy combatant.

Accordingly, the Attorney General is directed to surrender Mr. al-Marri to the Secretary of Defense, and the Secretary of Defense is directed to receive Mr. al-Marri from the Department of Justice and to detain him as an enemy combatant.

DATE: George W. Bush
White House Office-controlled Document
6/23/03

66 FR 57833

Notice

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

November 13, 2001

*57833 By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and

the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the

United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense *57834 purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

1. there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more in dividuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained

in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be –

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for – *57835

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that

time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by

law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to –

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order –

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or *57836 proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.